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CHILD SEXUAL ABUSE VICTIMS IN THE COURTS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON JUVENILE JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

OVERSIGHT HEARINGS TO CONSIDER THE TESTIMONY OF CHILDREN IN SEXUAL ABUSE CASES

MAY 2 AND 22, 1984

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CHILD SEXUAL ABUSE VICTIMS IN THE COURTS

WEDNESDAY, MAY 2, 1984

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:38 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Arlen Specter (chairman of the subcommittee) presiding.

Staff present: Mary Louise Westmoreland, chief counsel and staff director; Mike Wootten, staff counsel (full committee); Scott Wallace, counsel; and Tracy McGee, chief clerk .

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON JUVENILE JUSTICE

Senator SPECTER. This session of the Juvenile Justice Subcommittee of the Judiciary Committee will now begin.

We have delayed the start of the proceedings for just a moment or two, so that we could clear up some ground rules. We are going to be having testimony from two women about allegations of sexual abuse involving their children. The request has been made by these women who will testify that they not be photographed full-face, or face at all. They will be identified as Mrs. Jones and Mrs. Smith, to protect their identities, although the testimony that they will give will be real, and their statements of what has happened in their family lives.

Similarly, the request has been made of the still photographers that face pictures not be taken. These are requests; these are not orders. This subcommittee does not have the authority to make any directions or any orders, but to the extent that the media will cooperate with that, the subcommittee will appreciate it, and the women will appreciate it.

The subject matter of this hearing is sexual abuse of children, and it is a second hearing in a current series, and one of many, which the Subcommittee on Juvenile Justice has held over the course of the past 3½ years.

The scope of this testimony today will be to examine some problems which have only recently come to light in the kind of volume which will be testified about here today. They involve allegations of sexual abuse by parents or stepparents of children, in rather stark, and rather dramatic, and rather amazing terms.

It is a problem which has largely been swept under the rug and has not been discussed and has not been analyzed. Only recently, it has come to be written about in an extensive matter.

Today, one of our witnesses will be Judge Younger from the Superior Court in Pomona, Calif., who will testify about a case where a 19-year-old individual, Robert Moody, was convicted of voluntary manslaughter after killing his father, because, as the defendant said, the father had sexually abused the father's daughters, had beat his sons, and had forced his wife into prostitution. The result of that case was an unusual probationary period, with the requirement for 2 years in public service, doing construction work at refugee camps in Hong Kong.

A second case which we will consider today will be through the testimony of Deputy District Attorney Ken Kobrin, of Salina County, CA, on a very unusual case where a 12-year-old girl complained of sexual abuse by a stepfather who was a doctor, and then declined to testify, fearing that her story would further hurt the family, and she was fearful of testifying in a roomful of strangers. When the child refused to testify, she was held in contempt and held in custody for 8 days, so that the unusual result occurred that the victim/witness was incarcerated. Eventually the case was dropped. We are going to be hearing from Deputy District Attorney Kobrin on that subject.

We are going to be hearing from two mothers in unusual settings where, in circumstances arising out of custody disputes, the allegations have been made—and I call them allegations not because I disbelieve them, but not that I do believe them, because these are things we have to hear—where the fathers, under visitation rights, are alleged to have sexually abused the children. There is substantial corroborating evidence about the physical condition of a young woman-child to corroborate what she has said.

One official from D.C. Children's Hospital Sexual Abuse Program has recently reported that he has dealt with about a dozen such cases in the last 6 months. The chief of pediatrics at Baltimore's Lutheran Hospital and chairman of the Governor's Task Force on Child Abuse of Maryland has complained that the courts in that jurisdiction, which handle divorce and related issues, like custody matters, have virtually ignored the abuse issue in their treatment of these cases.

They represent extremely strong charges; if true, or partially true, outrageous conduct. The real question is what is to be done about them. An attorney who is representing one of the mothers will be questioned about the current disclosure of such matters, as to whether this is a recent phenomenon, whether it has been going on for a long time, or just what the situation is or may be.

I know that from my own experience as a prosecuting attorney in Philadelphia in the sixties and early seventies, that while I heard about just about everything under the Sun, not all of which could be proved, this kind of conduct was not a matter which was reported.

It seems doubtful if anything is really totally new, but there may be an issue as to why these matters are coming into prominence at this time, but there is no doubt that there is a widespread problem, that it ought not to be swept under the rug, that it ought to be

seen for what it is, and corrective action taken, perhaps through the funding efforts of the Office of Juvenile Justice and Delinquency Prevention.

With that introduction, I would like to call a witness whom we will identify as Mrs. Smith. I would like to ask her attorney, Donald Bersoff, Esq., to accompany her to the witness table.

Mrs. Smith, as I understand it, it is your preference that you not be photographed?

Mrs. SMITH. Yes, it is.

Senator SPECTER. All right. We appreciate your coming, Mrs. Smith. We know that this is not an easy matter, but we believe, after having conducted an investigation of the matter preliminarily, that you have important testimony which ought to be heard.

Please proceed at this time to tell us just what your situation is and what happened to your children.

STATEMENT OF MRS. SMITH, ACCOMPANIED BY DR. DONALD N. BERSOFF, ATTORNEY, ENNIS, FRIEDMAN, BERSOFF & EWING, WASHINGTON, DC

Mrs. SMITH. Thank you.

I appreciate this opportunity to speak to you today about the sexual abuse of children by their noncustodial parents during visitation periods.

For over 1 year now, my efforts to protect my daughters have left me totally frustrated and angry. I have been separated from my husband since December 30, 1982, and prior to our separation, he was verbally abusive and physically violent toward the children and me. In the 2 months prior to his leaving the house, he picked up my older daughter and threatened to kill her, and he knocked out my younger daughter, who repeatedly blacks out since that incident.

Senator SPECTER. What are the ages of your two daughters?

Mrs. SMITH. My children are at this time 3 years old and 4 years old.

When my husband left the house, the children were 1½ and 3.

Senator SPECTER. And your husband left the house when, again?

Mrs. SMITH. In December 1982, December 30.

Senator SPECTER. December 1982.

Mrs. SMITH. That is correct.

Senator SPECTER. You may proceed.

Mrs. SMITH. I turned to the legal system for help. I sought legal counsel to obtain supervised visitation, and I was advised at that time that the courts would not consider this motion because of the divorce. No one bothered to consider what was in the best interest of the children.

Mommy, please make daddy stop hurting me, is a cry that I cannot ignore, just as I could not ignore the fact that my children all of a sudden were becoming withdrawn, they were reverting to fetal positions, they were afraid, they were crying, and clinging, they were having urinary problems, and nightmares. I had an incident where my older daughter, upon hearing the word, "Daddy," picked up a pen and stabbed through two kitchen chairs. And this is when she was 3 years old. That is a lot of anger in a little child.

The children were hitting dolls, and they were violently refusing to go with their father. They were screaming.

My 3-year-old daughter required prescription vaginal soaks after each visitation with her father, and my 2-year-old daughter could not move her legs after a visit with her father.

Senator SPECTER. What physical signs, if any, did you observe which led to those vaginal soaks, as you have described them?

Mrs. SMITH. I noticed that my daughter would come home, and her vagina was red and swollen. She was unable to urinate for up to a 24-hour period and then urination was painful.

Senator SPECTER. How old was she at the time?

Mrs. SMITH. She was 3 years old.

Senator SPECTER. And how frequently did that occur?

Mrs. SMITH. This occurred every visitation that she had with her father.

Senator SPECTER. And what did you do for that problem?

Mrs. SMITH. I consulted a pediatrician. Of course, she was seeing one regularly. He prescribed vaginal soaks for her. So that every time that child came home from a visitation, she was required to have 20-minute soaks three times a day in a bathtub.

Senator SPECTER. Was there any statement made by your daughter as to the cause?

Mrs. SMITH. No; there wasn't. And that is one of the problems. I kept asking—my children kept telling me: "Daddy is hitting me, Daddy is hurting me. Make Daddy stop."

And I would say: "Tell me what Daddy is doing." And the children would become totally silent. They would become totally withdrawn.

I was told that fathers are allowed to hit their children.

I was told that the court would just label this problem as that of another woman trying to get even with her estranged husband.

No court will listen to you.

And unfortunately, I found that is true. The courts will not listen to me or my children, or to the expert medical witnesses I have to back up the alleged sexual abuse of two very minor children.

On October 29, 1983, my oldest daugher disclosed to me what her father was doing to her. This was the first time she had come home that I had asked her to: "Show me what Daddy is doing to you," rather than saying to her: "Tell me what Daddy is doing to you."

My daughter walked in from a visitation. She could not stand up straight. She was doubled over. She was rolling back and forth on the floor. She could not urinate, and she was lying there, writhing in pain, saying: "Daddy hit me, Daddy hurt me."

I said: "Where did Daddy hit you?"

She said: "Daddy hit my sissy."

I said: "That is very hard to do. Would you show Mommy how somebody could hit your sissy?"—at which point, my daughter showed me. She lay back and she spread her legs apart, and she took her finger and she showed me exactly how Daddy was hitting her.

Senator SPECTER. And what did she show you?

Mrs. SMITH. She took her finger and she began rubbing up and down on her vagina. And then she just started screaming.

The children have had a terrible problem disclosing what has happened. It has come out that they have been threatened that if they talk, Mommy will be taken away, Mommy will be killed, they will be physically hurt, Daddy will come and get them at night when they are alone in their rooms—the threats are just unbelievable. It is emotional abuse that is impossible for a child.

Senator SPECTER. Did the children complain to you of specific threats by their father?

Mrs. SMITH. Since October 29, the children have definitely complained of specific threats. Until that point, all they could get out was: "Daddy is hitting me, Daddy is hurting me. Make Daddy stop." And then they would sort of gasp and say: "I can't talk."

Senator SPECTER. Now, as a result of that report, what action, if any, did you take?

Mrs. SMITH. As a result of that—well, first of all, I was unable to take any action at the time, because I was advised by my former attorney that if I reported this incident, it would be totally ignored; I would be, again, another woman in a divorce situation, making an accusation against the man.

I would like, at this time, to clarify the point that Dr. Donald Bersoff became my attorney in this sexual-abuse issue on March 16, 1984, which was 5 months after this disclosure was made.

My children were being seen at the time in treatment by a counselor, because I was having so many problems with visitation I did not know what to do.

Senator SPECTER. Did you tell the attorney about the corroborating evidence that you had, about the physical swelling and the trips to the doctor?

Mrs. SMITH. Yes; I did. Unfortunately, the doctor did not list these in the correct way. He would list: "Trouble urinating; urine culture." There were throat cultures. We had constant urine cultures and constant throat cultures, constant problem urinating.

Senator SPECTER. Did your attorney talk to the doctor?

Mrs. SMITH. No; he did not.

Senator SPECTER. Did you accept your attorney's advice?

Mrs. SMITH. No; I did not accept my attorney's advice.

Senator SPECTER. What happened next?

Mrs. SMITH. I started going from person to person, trying to get help. I took my children to the counselor that they were seeing. My daughter pointed out on a doll, with her finger, to the counselor, what was being done, pushing her finger between the doll's legs, back and forth. That counselor reported this to Protective Services of Montgomery County. Montgomery County Protective Services came out to the house two times on the day it was reported and on the next day to talk to the children—who were terrified at that point and did nothing. They withdrew totally. And rather than continue seeing them, trying to get a relationship with them so they would talk, they just stopped.

I was brought into the circuit court before Master James Ryan on December 7 because my husband had requested specified visitation rights. I had stopped visitation rights altogether as of October 29. I had no court-acceptable evidence to present, and therefore, I was forced to agree to visitation.

Senator SPECTER. Did you tell the master about what had occurred to your daughters?

Mrs. SMITH. I was not allowed to do that. I was advised by my attorney and by protective services and by the counselor that I was seeing that I had no evidence that I could present, and therefore, I could not make those allegations.

Senator SPECTER. You accepted that advice?

Mrs. SMITH. No; I did not. When the master asked me to agree to visitation, I hesitated. And at that point, the master told me that if I did not agree to this visitation, I would not like his decision.

Senator SPECTER. Mrs. Smith, it sounds surprising to me that anyone could conclude that you did not have evidence. You had your observations. You had the children's statements to you. You had the physical corroboration. But you are saying that those who were counseling you discouraged you from bringing this matter to the attention of the master.

Mrs. SMITH. That is correct. I was told that mother's words don't count for anything.

Senator SPECTER. That was because you were in a divorce contest with your husband, and the issue was custody and visitation. Therefore, the credibility was not sufficient even to bring that to the master's attention?

Mrs. SMITH. That is absolutely correct. That is just what I was told. And nobody seemed to care about the fact that my children were in danger, my children were being sexually abused. I did not understand how this was even a custody issue at this point. It seems to me the safety of little children is involved here. It has nothing to do with custody. Unfortunately, in the law, it does.

Senator SPECTER. Well, there is a great deal more than any of that involved. There is the question of criminal conduct involved. That kind of conduct, if true, states a crime, and a very serious crime.

Mrs. SMITH. Oh, well, further down the line, I have had contact with what the criminal system will do about this, also.

Senator SPECTER. All right. Proceed, and tell us what happened.

Mrs. SMITH. On December 16, I submitted a petition to the court to terminate the visitation rights of the father, with a letter from the psychiatrist to whom my daughter had disclosed information. To date, that petition has not been heard. And frankly, the only comment I have gotten about that from everyone, including the masters, is: "This has never been done in the State of Maryland"—terminating a father's rights. And if it has never been done, it is time it was done.

Senator SPECTER. Do you mean terminating a father's visitation rights on these grounds?

Mrs. SMITH. On grounds of sexual abuse, that is correct. They claim that no father's visitation rights have ever been terminated.

Then, on January 26, I was again in the circuit court. This time, I was charged with contempt for refusing visitation. I was again seen in front of Master James Ryan. He found me not guilty of contempt; however, he ordered visitation, and he ordered visitation with the abuser's mother or sister to be present—which is not adequate protection for any child who is being sexually and emotionally abused. You are talking about possibly the only two people in

the world who will never realize or never think that a man would do something like this—his mother and his sister. They would never adequately protect my children.

And no one took into consideration the fact that my children were terribly emotionally abused, and they are unable to handle visitation at this point.

The next day, I was in juvenile court in an action brought by protective services. We were seen by a judge who listened to testimony very shortly, briefly, from the psychiatrist who had seen the girls, and he terminated the father's visitation for 30 days or until an adjudication hearing.

Senator SPECTER. At this time, protective services was advancing the evidence about the abuse that you have already testified to?

Mrs. SMITH. That is correct—well, no testimony had been brought in the circuit court yet about abuse. That has not been allowed to date into the circuit court.

Senator SPECTER. But protective services had raised the issue that the evidence was present, if the court would hear it?

Mrs. SMITH. That is correct.

On February 14, I was brought back into the circuit court in Montgomery County, again in front of Master James Ryan, again charged with contempt for refusing visitation. I was found not guilty. However, visitation was ordered. And how a master can find that I am not guilty of believing my children are being sexually abused and then order them out with the abuser is just beyond me.

However, I was also charged with court costs and legal fees at that hearing.

On February 22, we went back into juvenile court, and this was the scheduled adjudication hearing. At that hearing, my husband stood up, and he appealed on a technicality that this would be changing a law from the circuit court concerning custody. The judge had the opportunity to accept this appeal or not accept it. He accepted the appeal, and therefore, no hearing took place. And now, we are awaiting a hearing in the special court of appeals in Maryland.

Senator SPECTER. What was the issue then before the juvenile court? It was not the visitation rights, there?

Mrs. SMITH. Well, yes, it was the visitation rights, and this was the adjudication hearing for evidence to be presented on sexual abuse. Protective Services brought them in as children in need of assistance.

Senator SPECTER. Well, Dr. Bersoff, perhaps you can clear that up. Were there two courts involved here?

Dr. BERSOFF. Yes. It ended up being a jurisdictional dispute.

Senator SPECTER. And the first court had the issue of visitation rights.

Dr. BERSOFF. That is right, and the domestic relations litigation, generally.

Senator SPECTER. On the divorce issue.

Dr. BERSOFF. On the divorce issue, which involved, of course, custody and visitation.

Senator SPECTER. And the second court, the juvenile court, had what issue?

Dr. BERSOFF. Well, there was a petition in the juvenile court to declare the children "in need of assistance." The court agreed that, in fact, they were in need of assistance. They kept physical custody with my client and issued a no contact order for 30 days, that is, that the father could not visit for 30 days. But then, what happened was a jurisdictional dispute between the circuit court and the juvenile court of Montgomery County, and eventually, the juvenile court decided to give way to jurisdiction to the circuit court.

So there is still a question, however, in situations like this, of who has primary jurisdiction. At this point, at least, it appears as if the circuit court does, the one that is handling the domestic relations litigation, so that eventually, that 30-day no contact order was dissolved. And right now, the only entity that has jurisdiction and is making orders is the domestic relations court in Montgomery County.

Senator SPECTER. Mrs. Smith, would you proceed, please?

Mrs. SMITH. Yes.

On March 20, we were back again in the circuit court, again in front of Master Ryan, and again I was charged with contempt for refusing visitation. This time, I was found guilty. I was ordered into detention for 10 days. Visitation was ordered, and I was charged with legal fees and court costs.

Senator SPECTER. But you did not serve the detention?

Mrs. SMITH. No, I did not serve the detention yet. That is still coming up.

Senator SPECTER. Is it still an outstanding order?

Mrs. SMITH. Oh, yes, it is.

Dr. BERSOFF. The master has the right to order visitation, but he does not have the right to issue a contempt order. He can only make a proposed recommendation as to contempt.

Senator SPECTER. So the court has not yet ruled on the master's recommendation for a contempt citation with 10 days in jail.

Dr. BERSOFF. That is correct. We filed a motion to hear this case anew in the trial court, essentially, asking for a review and appeal of the master's order, and that is still outstanding.

Mrs. SMITH. Two days after that court procedure, my oldest daughter disclosed to the police on tape. On April 24, last week, we had two more hearings in circuit court. In the morning, Dr. Bersoff brought a motion to remove Elizabeth Tennerly, the guardian ad litem for the children. This was brought in front of a judge. The judge did not even listen to Dr. Bersoff's pleadings. He denied the removal of this attorney, and again, he ordered me to pay court costs.

In the afternoon, I was in front of Master James Ryan again, because the father has requested more visitation with the children and a reduction of support payments. Master Ryan has ruled that visitation continue, that he is to have an additional 3 hours with the children during the week, and child support payments from the father have been terminated.

The courts have to date failed to protect my children. We live in a constant crisis situation. We live under the threat of this man coming every week to take these children out for visitation.

Senator SPECTER. Is he still coming to take them out for visitation?

Mrs. SMITH. He has yet to come to the house and actually try, since December 11. However, he calls every week, and I do live under the threat of him coming.

Senator SPECTER. But he has a right, as of this time, to come each week for visitation.

Mrs. SMITH. He has a right, that is correct. And, even though he never came to the house and attempted to take the children out, he has still been able to charge me with contempt for refusing visitation.

I have been told before each court date, except the last one, on April 24, 1984, exactly what the outcome of the trial will be. I question how a court can legally decide a pleading before evidence is presented. I have not yet been allowed to present evidence into court concerning the alleged abuse.

I feel that my children and I have been denied due process of law. The State's attorney refuses to bring criminal charges against my husband in spite of the overwhelming evidence available to him.

Senator SPECTER. Have you filed criminal charges?

Mrs. SMITH. I am not allowed to file criminal charges in Maryland. This must be done by the State's attorney.

Senator SPECTER. Well, you have filed a complaint with your State's attorney.

Mrs. SMITH. Well, yes, this has been brought, and the State's attorney has on tape a disclosure from my daughter.

Senator SPECTER. What is the status of that complaint?

Mrs. SMITH. The State's attorney Mr. Barry Hamilton, told me that he is not going to prosecute this man criminally, because after all, we are talking about a 4-year-old child and a 2-year-old child, and they could never be legally competent witnesses. And he told someone else that he is absolutely not going to do this, because it has never been done in Montgomery County, and it certainly has never been done to a white-collar worker—which is not very comforting to me or my daughters.

Senator SPECTER. Dr. Bersoff, have you had contact with the public prosecutor?

Dr. BERSOFF. The State's attorney, yes; we have, indicating that we have reports from protective services, from a psychiatrist and a psychologist, both of whom have evaluated the children. And essentially, what my client reports is what the State's attorney said, that no court in Maryland has ever heard a 4 year-old, and no court will, and when a father is denying these charges, it would be a waste of time to take this to a jury, and using his prosecutorial discretion, has decided, at least at this point, not to do so—even including the fact that there is a statement made by one of the children on an audiotape to a female police officer, talking relatively explicitly about what she believes her father has done. But even with all of that evidence, the State's attorney to this point has refused to file criminal charges or consider doing so.

Senator SPECTER. Proceed, please, Mrs. Smith

Mrs. SMITH. Thank you.

This case has been closed and sealed, supposedly to protect the children. I did not ask for this to be done. The alleged abuser asked for this to be done. And in reality, all it has done is to protect the

abuser. It has prevented us from speaking up and from getting help.

My children need protection, and all children need protection. And I am thankful that this subcommittee believes it is important to help the children who are the tragic victims of sexual abuse.

Thank you.

Senator SPECTER. So what you are saying is that up to this moment, you have not been permitted in any court to present the evidence by the children on the charges of sexual abuse.

Mrs. SMITH. That is correct.

Senator SPECTER. And the visitation rights continue until this moment, although your husband has not sought to exercise them since December 1983.

Mrs. SMITH. That is correct.

Senator SPECTER. And that his obligation to support his daughters under Maryland law has been suspended.

Mrs. SMITH. That is correct.

Senator SPECTER. And why was that done? Regardless of the controversy between a husband and wife, the obligation to support the children continues.

Mrs. SMITH. Well, the father lost his job, accepted another job for quite a lot less money than he is capable of earning, and he has gone into the courts and said, "This is all I can earn." And his actual request to the court was that he need only pay $400 a month in total for support of the children.

Senator SPECTER. Well, was that granted, and if so—.

Mrs. SMITH. No, that was not granted. He is still to pay the mortgage on the house and the insurance and whatever he was ordered to pay.

Senator SPECTER. So he does have some continuing obligations to support.

Mrs. SMITH. Yes, he does. But in actual fact, the only money that I received a month coming into the house was the $300 cash that he was ordered to pay in support of the children.

Senator SPECTER. I do not understand. Is the order in effect that he will pay some dollars for the children's support?

Mrs. SMITH. The master just ruled that he is not responsible for paying that at this point in time.

Senator SPECTER. So, does he have any obligation to pay anything toward their support now?

Mrs. SMITH. Well, if you consider where they are living, the mortgage on the house, yes.

Senator SPECTER. The mortgage, but that is all?

Mrs. SMITH. He is obligated to pay that, but of course, he has not paid that as of last month. He told me that he would not do that. And I am now waiting to be evicted from my house, which I am sure will happen shortly. He is to be paying medical bills for the children, but I have $1,600 worth of back medical bills that have not been paid. He is to be paying all insurance on the house, but I have had to borrow money to pay for certain insurances. He is to pay the water, which he has paid, and he is to pay the electric bill, which to date, he has paid.

Senator SPECTER. All right. Thank you very much, Mrs. Smith.

Dr. Bersoff, you are a psychologist as well as an attorney.

Dr. BERSOFF. Yes, I am.

Senator SPECTER. And you have, as I understand it, substantial experience in the overall issue of abuse of children, as well as being a practicing attorney.

Dr. BERSOFF. That is correct.

Senator SPECTER. Would you outline briefly your qualifications in that regard?

STATEMENT OF DR. DONALD N. BERSOFF

Dr. BERSOFF. Well, I received my doctorate in psychology about 20 years ago, and have specialized in families, children, and school psychology, and have done assessment with children and families. About a dozen years ago, I decided to try to combine my interest in the legal aspects of psychology. I went to law school and have been practicing as an attorney for the last 8 or 9 years.

Senator SPECTER. Dr. Bersoff, before moving to your generalized observations on this subject, what is happening in this case? Why can't Mrs. Smith get somebody to hear the evidence of child abuse? It seems incredible to me. A 4-year-old person may be competent under some circumstances. Have you presented any authority to the district attorney as to the law on competency?

Dr. BERSOFF. I think the district attorney knows the general principles, does not believe that the general principles can be implemented.

One of the basic problems in this case——

Senator SPECTER. But there is authority for a 4 year-old testifying.

Dr. BERSOFF. That is exactly right. In fact, I gave him a citation to a New Jersey case of a 4-year-old who is the sole witness and victim to sodomy, and that 4-year-old was allowed to testify. The principle with regard to testifying is whether children have sufficient intelligence and ability to give reliable and relevant testimony that could be of assistance to the court. And I believe, on the basis of my knowledge as a psychologist, and also my experience as an attorney, that young children in fact can give accurate descriptions of what they have experienced, if the questions that they are asked are direct, simple, and framed in the language of the child.

Senator SPECTER. Have you interviewed these children?

Dr. BERSOFF. I have seen the children, and of course, I have been involved with representing children in custody disputes before.

Senator SPECTER. What is your legal judgment as to the competency of these children to testify?

Dr. BERSOFF. Well, I think that based on what they have said to others, what others have reported to me, and what I have seen myself, that these children could be competent witnesses. The difficulty is getting these children heard.

But it is not only the courts' naivete about child development that is preventing the evidence being presented. In Maryland, under a recent decision, children who are involved in custody disputes, in which they have seen mental health professionals, must have an attorney appointed for them as the guardian ad litem. And for some reason, which I cannot fathom, but which the courts seem to accept, the children's lawyer in this case, who has never seen

the children and never interviewed the children, has decided that she will not waive for the children the psychologist/psychiatrist patient privilege. So, since these children have made statements to a psychiatrist—a very experienced and sophisticated and sensitive psychiatrist—and to a psychologist at Children's Hospital in the Sex Abuse Unit, about this material, the guardian ad litem has said that she will not allow the testimony to come in in order to protect the children's therapist-patient privilege.

Senator SPECTER. Well, is there a requirement that the psychologist and psychiatrist be available to testify in order to have the children competent as witnesses?

Dr. BERSOFF. No——

Senator SPECTER. So why is the waiver indispensable to the proceeding?

Dr. BERSOFF. Well, the mental health professionals have interviewed these children extensively. The children have made explicit statements about what they believe their father is doing. In the face of the fact that the courts are not going to listen to the children, the next best evidence is the testimony of these mental health professionals.

Senator SPECTER. Will the mental health professionals be competent to testify as to hearsay?

Dr. BERSOFF. I would certainly—the basis for their opinions would be admissible. Strictly speaking, it is not being submitted for the truth of the statement, but to undergird the opinions of the professionals.

Senator SPECTER. I would think there would have to be an evidentiary base of the children's testimony before the professionals could give opinions.

Dr. BERSOFF. Well, I am not sure what you are saying, but the evidentiary basis, as I see it, is the material that they have told to the psychologist and the psychiatrist.

Senator SPECTER. But if the issue is, were the children molested, how could the psychologist and psychiatrist testify to that?

Dr. BERSOFF. Well, first of all, they have observed the children, and during their observations, the children have engaged in very infrequent kind of play with what are called anatomically correct dolls——

Senator SPECTER. But the problem with the testimony of the psychiatrist and the psychologist, it is hearsay, what they have heard from the children. So that I would not see how they could testify to the underlying fact as to what happened to the children, what the children have told them happened to the children.

Dr. BERSOFF. Well, again, I think there are a couple of bases. One is, as I said, that in order to support the underlying opinions, the information that they have received would not be hearsay, that is, it is not admitted for the truth, but rather, to justify the opinions of the professionals.

Senator SPECTER. Well, what opinions, then, would they be called upon to testify to?

Dr. BERSOFF. Whether, to a reasonable or psychological or medical certainty, they believe that on the basis of their interviews with these children, the children, in fact, have been abused.

I think there is also a second basis for admitting their testimony. I think that in a divorce proceeding, the children are nominal parties. Their custody and their visitation is at issue; their future is at issue, and as a party, their statements could be admitted as well.

And also, if the court would like to construct some means to interview these children, I do not think that my client would object to their being interviewed. I think there are ways to construct courtrooms and to construct situations so that the children, in fact, could be interviewed very sensitively. For example, in some courts——

Senator SPECTER. Well, that seems to me to be the central question.

Dr. BERSOFF. Yes.

Senator SPECTER. I do not follow the testimony of the psychiatrist and the psychologist; it seems to me to be highly questionable without the preliminary testimony of the children. And the critical aspect is the testimony of the children, because only the children can testify firsthand as to what happened. Mrs. Smith can testify as to corroboration. She can testify as to what she observed about the reddening and about the physical situation that she saw.

Do you anticipate an effort, Dr. Bersoff, to have these children testify before the relevant courts in this case?

Dr. BERSOFF. I think if it would be permitted, I certainly think it would be helpful.

Senator SPECTER. Do you intend to press it?

Dr. BERSOFF. Yes; I intend to do so. The experience with the State's attorney has been disheartening.

Senator SPECTER. Well, aside from the State's attorney, you have these other proceedings.

Dr. BERSOFF. That is correct.

Senator SPECTER. You have two courts that you are in where you may be able to persuade a judge to listen to you, or at least make a preliminary determination as to competence.

Dr. BERSOFF. If the court would allow it, I think that certainly, it would be very helpful. Whether the court, of course, will believe their testimony or discount it, or consider it fabricated, of course, is up to the court. But I think it would be very important. I think we have not taken children's ability to perceive, to testify, seriously enough, and I think that that is a major problem in the courts around the country.

Senator SPECTER. Mr. Bersoff, let me raise a related question with you. The Children's Caucus last week held some hearings with a view to propose television coverage for the Manhattan Beach child abuse situation, and the issue has arisen as to how to handle that. It arose in part out of hearings which the Criminal Law Subcommittee last week held on the Big Dan New Bedford rape case, about showing the victim on the screen, and the question about the chilling effects on children who are witnesses.

One of the suggestions which has been made is to have the children videotaped outside of the court proceeding and outside of the presence of the defendants, but with the defendants able to see the video show at the precise moment the child is testifying. Then, the cross-examination would be possible, as required under our system of law, by the attorney for the defendant, who might be present,

but the concern has been expressed about the intimidating aspect of having the defendants there, and there is an intimidating aspect about having a father, or a stepfather, or some relative present.

One of the things that we are interested in is the constitutional right to confrontation, which is a very fundamental right and a very important right, to assure a defendant's rights.

What is your opinion or judgment as to the propriety of having a child testify on closed-circuit television, without the physical presence of the defendant? Do you think that that would comport with the constitutional requirement of confrontation?

Dr. BERSOFF. Obviously, you have raised a very thorny issue. You have to balance the interests of the children and of the mother, who is making the complaint against the interests of the father, or of the potential defendant.

I think the way you have described it would be pretty much in tune with what the Constitution demands. I think that probably, one additional facet might be the father's presence behind—or whoever the suspected abuser is—behind a one-way mirror, so that the father or whoever it is, and the attorney, could view the testimony and in a sense be present, without having the children directly face the parent. And I certainly think, however, that there has to be, in order to comport with the right of confrontation or cross-examination, the opportunity for the opposing attorney to cross-examine—the children should be examined under oath—and to see, in fact, whether they know whether there is a difference between a truth and a lie.

So, if interviewed under oath, with proper considerations for the rights of the accused abuser, I think that videotaping could be used in the courtroom, if we have the videotaping done under specially constructed environments, and being interviewed and questioned by either sensitive professionals or attorneys who have been guided by sensitive professionals who are experienced in these matters.

Senator SPECTER. Dr. Bersoff, you are an expert in this field. There has been a rash of notoriety recently on issues relating to child abuse. The two cases that we are going to hear about later today, about the 19-year-old who killed his father because the father was sexually abusing the daughters in the family; the case about the 12-year-old girl who was held in confinement after she complained about sexual molestation by a stepfather; an extensive article in the Washington Post on March 24 of this year which reports the findings of the D.C. Children's Hospital Sexual Abuse Program; the findings of the chief of pediatric's at Baltimore's Lutheran Hospital; the chairman of Maryland's Governor's Task Force on Child Abuse; the extensive article in the New York Times on April 4 of this year captioned, "Sexual Abuse of Children Draws Experts; Increasing Concern Nationwide"—is this a recent phenomenon, or a phenomenon which has more occurrences now as opposed to a prior period?

I had commented earlier about my own experience as a prosecuting attorney in the sixties and early seventies, where these kinds of complaints were not presented. While a district attorney cannot necessarily bring all the cases that are presented to him, in a city like Philadelphia, we hear just about everything. This is not a line

which I heard, during that period of time. But today, it appears to be a rampant problem.

Do you think it is of recent origin, or at least in this magnitude and intensity, is of recent origin?

Dr. BERSOFF. Well, as a scientist, I have to say that it would be hard for me to come out with any conclusions. The prevalence of abuse is unknown. I know it is more common than is generally believed. My guess would be that it is not more rampant, but the reporting of it is more rampant. I think that——

Senator SPECTER. We very frequently use the expression, "the tip of the iceberg." But the size of the tip may have some relationship to the rest of the iceberg. Certainly, if this is a tip, there is certainly more of a tip showing.

Dr. BERSOFF. Well, I think that is right. I think there are a number of factors that I would say—I would certainly think that generally, the concern about children's rights which has developed in the last decade has been important. Certainly, the women's rights movement. I think legally, the breakdown of intrafamily tort immunity. I think the breakdown of the parent-child privilege; the willingness of people like my client to talk about these things, whereas they were not willing to before—I think all of these things have led to the statistics that we now have, which in fact show that it might be the tip of the iceberg. I know there is one report that only 2 percent of intrafamily sexual abuse is reported to the police. So if that is true, there is a whole lot more going on that we do not know.

Senator SPECTER. There is one more factor that I would like your judgment on. That is, there has been a dramatic change in the materials available on the newstand, the sexually explicit materials. A drastic change occurred in the late sixties and early seventies as to what you can buy and see: Couples in sexually explicit positions; children in the nude, in sexually explicit positions. This subcommittee has recently reported out a child pornography bill, and we have had very extensive hearings. I can recall very well the kinds of cases which were brought, flimsily, by prosecutors in the early sixties, which amounted to virtually nothing, and then the whole stream of movies—"God Created Woman," "Curious Yellow"—and then the laws were very materially changed, and today, on any newsstand, you can buy all sorts of materials which are not suggestive, but they are pictoral.

The question which I think would require some analysis, and I do not know the answer, is to whether that might be contributing, to suggesting conduct with fathers and children which might not have been so readily in mind in the past.

Dr. BERSOFF. Well, I think that certainly is a reasonable hypothesis. I do not think we know yet what the relationship between obscene or pornographic material and overt behavior is. I think it is still a guess. I think, rather than seeing the problem more as environmental, I believe that it is more related to the person who is doing the abuse himself. There may be rationalizations—for example, pornographic material, or hostility toward the mother, or the failure of the mother to be as loving as the father would want—those are all excuses that put the responsibility outside the person who is doing the abuse. My personal opinion is that we have to

look at the person himself. And as my client has said, in this case, the father has not admitted that it is going on, and that may be correct. But as she has said, one of the things that we do know is that when the parent does admit the problem and seeks help, that there is a significant amelioration of it.

Now, I would look to the person who is doing it rather than to stimuli outside of the person.

Senator SPECTER. Mrs. Smith and Dr. Bersoff, would you keep your seats? Our second mother arrived shortly after you started to testify.

[The prepared statement of Dr. Bersoff follows:]

Prepared Statement of Donald N. Bersoff

It is an honor to have the opportunity to submit this statement and I am especially appreciative that the Subcommittee believes the issue of the proper adjudication of sexual abuse of children is important enough to hold hearings on the matter. I am Donald Bersoff, one of the attorneys representing the mother you have just heard from. In addition to being a member of a law firm in Washington, D.C., I have taught and practiced psychology. I received my doctorate in the latter field almost 20 years ago, specializing in problems related to children, families, and schooling. One of my major interests as both a lawyer and psychologist is children. Nevertheless, I rarely involve myself in domestic relations litigation and my client currently has excellent representation in that regard. Because of my background, however, the children's mother asked me to become involved concerning the sexual abuse issues in the case.

You have already heard from the mother herself concerning the frustrations she has felt in attempting to get the courts, the state's attorney's office, and the children's appointed lawyer to take her children's claims seriously enough to take some action. The particular case you have just heard about probably epitomizes every major problem that confronts children when claims of sexual abuse are made in the context of domestic relations litigation.

First, in the case of very young children, as here, it is one of the parents who surfaces the allegations. When those allegations are raised in a divorce situation, the legal system tends to discount them as a ploy by the complaining party to gain financial or other advantage over the parent suspected of sexual abuse. Masters and judges who have become inured and cynical as a result of their involvement in emotional, contentious, domestic relations cases become resistant to these claims and, unfortunately, fail to take them seriously. Although there is no doubt that some complaining parents coerce their children to fabricate claims of sexual abuse for the parents' own ends, there are enough specific psychological, as well as physical, indications of abuse to separate the genuine from the false claims. Some of the symptoms children exhibit are withdrawal from others, sleep disturbances, regression to a more infantile level of development, sexually-oriented play

with dolls, depression, and school problems. In essence, they appear very much like other victims of severe stress, most particularly like women who have been raped. As a result of sensitive interviewing by mental health professionals and their subsequent testimony, judges ought to be able to sort out the spurious from the genuine claim. However, they have to be willing to listen to that testimony and very often they choose not to.

Second, courts are very naive about child development. They do not believe that preschool children, as in this case, are reliable reporters of events or can differentiate fact from fantasy, truth from lies. As a result, young children are, in almost all cases, not permitted to testify. Many state statutes hold that children below a certain age, e.g., 10-12, are presumed incompetent to testify. The basic test for competency is whether children have sufficient intelligence and ability to give reliable and relevant testimony that could be of assistance to the court. Social science evidence indicates that young children can give accurate descriptions of what they have experienced if questions are direct, simple, and framed in the language of the child. Furthermore, on certain memory tasks children as young as age 4-5 are able to perform as well as adults. Certainly, children can look incompetent in the face of inappropriate questioning by attorneys and judges asking long and complex questions. But, if done with some sophistication about children's language development, preschool children can be excellent witnesses. Yet, most states will not allow such evidence if the child is of preschool age.

Like Ralph Ellison's hero, children remain Invisible Persons whose testimony is rarely credited. For example, in this case, despite the fact that both of the mother's children talked quite explicitly about the conduct of their father to two experienced and sensitive mental health professionals--a psychologist and a psychiatrist--and one of them gave a audio-recorded statement to a female police officer, the state's attorney refused to move toward charging the father with sexual abuse in the light of the father's denials. His rationale was that no jury would convict the father based on the children's statements or the testimony of the professionals in the face of the adult's denials. Yet one could hypothesize quite reasonably that children have less incentive to lie than do adults. As a Los Angeles police officer stated in USA Today on April 6th, "When children report

something, go into any detail about sexual activities, you'd better believe it happened."

Third, lawyers appointed to represent children in divorce proceedings, ostensibly to protect their interests, often act adversely to or in ignorance of those interests. For example, in the case of my client, the children described explicit instances of sexual abuse by their father to the two mental health professionals I spoke of earlier whom they saw for evaluation and treatment. A lawyer was appointed for the children to decide whether to waive the psychiatrist/psychologist-patient privilege. The lawyer was well aware of those statements as well as a report by the Montgomery County Protective Services Unit recommending that the father should not be permitted visitation, even under supervision by his relatives. Yet, the children's lawyer refused to waive the privilege prohibiting the professionals from testifying at two recent hearings. ~~Their~~ Her rationale for blocking the testimony was that it would be ~~to~~ premature to admit it and it would be harmful to the children not to visit their father. As a result of this failure to waive, the mother was held in contempt for refusing to permit visitation, as the court had earlier ordered, and she is now faced with a 10 day jail sentence. Furthermore, the father's attorney has since filed a motion requesting more time for visitation with the children.

I do not impugn the motives of the children's attorney in this case. I just think her judgment is seriously faulty and her rationale for refusing to waive the privilege irrational. The privilege is designed to protect patients who do not wish to disclose personal communications in a legal proceeding. There is every probability that a young, sexually abused child unable to defend herself against an abusing father, would want the court to hear her testimony. Yet, the children's lawyer has never interviewed her clients to ask them whether they wished to continue to visit their father or whether their disclosures should be presented to the court. She has merely represented them in terms she perceives to be in their interest without ever attempting to discern what, in fact, their true interests are. When I moved to have the children's lawyer replaced with a more sensitive and sophisticated one, the court ruled that her judgment was sound and intelligent.

Lastly, the law has created a strong presumption in favor of family privacy and so any investigation into parent-child relationships is often done gingerly. For example, sexual activity that does not produce evidence of disease or forcible entry is reinterpreted as mere fondling between a loving father and his daughter. I wholeheartedly support the principle of minimal state intervention in family relationships, and we should recognize that the primary custodians of children are parents, not the government. But, the Supreme Court recognized 40 years ago that although parents can make martyrs of themselves, they may not make martyrs of their children. Under that principle, every state legislature in the United States has established child abuse reporting statutes. Nevertheless, while we have enforced those statutes in cases of physical abuse, we have not done nearly so well in cases of sexual abuse.

I have only briefly sketched major problems gleaned from my experience. In terms of solutions, I can suggest a few, also briefly. First, it would be helpful to have specially trained police officers and prosecutorial staff to investigate allegations of sexual abuse and interview children. There is a major training role for clinical, school, and developmental psychologists in this regard.

Second, we should develop specially constructed environments in which to interview children. It would be very helpful to place children in comfortable, familiar settings, have them talk to sensitive professionals and police officers, and have those interviews recorded on video tape. In this way, the tape could be used several times which would prevent repetitive interrogation in frightening surroundings like a police station or courtroom.

Third, we need to educate those who populate the legal system that claims of sexual abuse are not mere ploys by a querulous, self-interested party in a divorce but is a serious problem that is traditionally underestimated and underreported. The prevalence of sexual abuse is unknown but a variety of estimates in the literature indicate that about 20-30% of females have had sexual contact with males prior to age 16. One study asserts that only 2% of intrafamily sexual abuse is reported to the police. The recent revelations of sexual abuse of children in day care centers and nursery schools have served to heighten our awareness but it is still true that

society has not invested very much by way of resources for identification, treatment, and prevention.

Finally, we must learn to trust children's judgments and perceptions more than we do. If there is one pervasive myth that seems impervious to change at the present, it is about children's capacity to perceive, to make decisions, and to exercise judgment. The Supreme Court has perpetuated that myth asserting, without evidence, that children, even in adolescence, are incompetent to make decisions concerning their own treatment. If our most respected legal body is ignorant of, or refuses to believe, the social science evidence that proves otherwise, it will be difficult to persuade local judges that children should and, indeed, must be heard. Until that happens, we will continue to pay mere lip service to our often proclaimed intent to protect children's best interests.

Thank you.

Senator SPECTER. I would like to call on a woman who we will identify as Mrs. Jones to step forward at this time.

Would you come forward, Mrs. Jones?

Mrs. Jones, you were not here before we started, but the issue arose as to being photographed, and there had been a screen arranged here, which seemed to me to be very cumbersome. The request has been made that neither you nor Mrs. Smith be photographed, and it is not a binding order, because this committee has no authority to give binding orders to the media. But I believe it is being observed, and the question that I have for you—and it may be too late to ask now—is that arrangement satisfactory with you?

Mrs. JONES. Yes, that will be fine.

Senator SPECTER. Mrs. Jones, we will not refer to you by your name, in order to protect to the extent we can your anonymity. Would you pull the microphone closer to you and tell us what happened to you and your 12-year-old son and 11-year-old daughter?

STATEMENT OF MRS. JONES, BALTIMORE, MD

Mrs. JONES. Our nightmare began the latter part of 1978. Sexual molestation of my children was not suspected by me until 1981, when my daughter at that time was 8 years old, and began to act-out sexually. She did not come forth with her sexual molesting——

Senator SPECTER. Mrs. Jones, when were you married?

Mrs. JONES. In 1968. December 14, 1968.

Senator SPECTER. And were you separated at some point after that?

Mrs. JONES. We were separated in 1979, and my divorce was final in 1981.

Senator SPECTER. Your daughter is now 11, and your son is now 12?

Mrs. JONES. Yes; my daughter will be 11 in August, and my son just turned 12.

Senator SPECTER. All right. That sets the chronological scene. Now, would you proceed?

Mrs. JONES. My daughter was not able to come forth with what had been happening to her sexually until February 27, 1983. So I lived with fears; my children lived in great agony——

Senator SPECTER. She did not report it until February 27, 1983?

Mrs. JONES. Yes.

Senator SPECTER. When do you believe that it began?

Mrs. JONES. She claimed it began in late summer, early fall of 1980, when she had just turned 7 years old.

Senator SPECTER. As precisely as you can tell us, what happened to her, according to her claim?

Mrs. JONES. According to her claim, she would be asked to come into her father's bedroom to have a talk; the door would be shut. At that time, he would undress and put his penis in her mouth. She would then have to fondle his body, while he fondled hers. There was oral ejaculation. They then would go to bed, and he would try vaginal penetration. When I asked her if he actually had penetrated I do not think she totally understood, and I did not want to put any additional words in her mouth. She described him as rubbing his penis between her legs and trying to force it into her vagina. When she would scream that it hurt, would he please stop, he would become angry and would stop.

She did tell me that she would come home and not tell me that she had vaginal itching; when she went to urinate, it was very, very sore.

She, as well as my son, had been living under great threats of being physically abused to the extent where they could not see anyone. They were threatened to be taken away and never returned home. These threats were carried out during visitation, with calls being made to me while they were with their father, stating that they would not be brought home.

Senator SPECTER. Over how long a period of time did that go on between the father and the daughter?

Mrs. JONES. It went on from 1980 through September 1982.

Senator SPECTER. So, from the time she was 7 until 9?

Mrs. JONES. Yes.

Senator SPECTER. About how many times did that occur, if you know?

Mrs. JONES. It occurred on each visitation time.

Senator SPECTER. How frequent were those?

Mrs. JONES. Visitation was ordered every weekend.

Senator SPECTER. What, if anything, happened to your son?

Mrs. JONES. My son, I was aware, had been receiving a great deal of physical abuse as well as emotional abuse. He had been in therapy since 1979, and by 1981, I was being told that he was in such a state that when he became an adolescent, I should think of institutionalizing him. I was advised in 1982 by a Baltimore City Protection Service worker, Paul Katz, that Alex was also sexually abused.

Visitation was so traumatic, it got to a point where he was absolutely refusing to go. The first time he refused to go, he barricaded himself under the basement steps, barricaded himself with my

daughter's childlike kitchen sink and refrigerator standing on top of one another, not allowing anyone in to him. He then would run up and hide in his room, and I would have to drag a 90-pound young man down the steps, clinging to the bannister, kicking, screaming and cursing at me. This went on through each visitation time.

I went to the pediatrician on the sexual acting out of my daughter; she would hold her legs up in the bathtub, as if she were at a GYN for an examination, and let warm water run into her vagina.

Senator SPECTER. How old was she when she did that?

Mrs. JONES. Seven and a half, eight years old.

She then showed my 12-year-old how to have intercourse, and at one time, paid him to have intercourse with her. I had caught them one time with their clothes on, and then was told of the other occasions by my son, of what she had done. He said they undressed on the other occasions.

Senator SPECTER. You say you caught them on one occasion how?

Mrs. JONES. With their clothes on, imitating intercourse.

I also saw her allowing our dog to lick her vagina in her bedroom. We have a very small dog that sleeps with us; it bed-hops at night, goes from one bed to the other. I had come upstairs several times and saw this, and I thought, am I seeing correctly, is this really real, is she coaxing this dog to do this.

I approached the pediatrician about it and he said, "Well, maybe she is just more mature for her age than most girls." I went to the psychologist about it, with my daughter beginning therapy in 1981. They again blamed it on maturity. No one would come out and admit that it could be sexual abuse.

My son and daughter both told me that my daughter was being french kissed by her father, describing what french kissing was, putting tongues in each other's mouths; that she was being forced to sleep with her father.

My son and daughter were telling me that my son was being forced to bathe with his father, as well as sleep with him on occasion against his will; that my son was being punched, kicked, thrown, slapped, and even bruised, but the bruises were not shown to me until they were healed, or even told about it for fear of what might happen.

I made a report to the authorities the first time I heard of my son being bruised. They said all they could do was make up a suspected report, but nothing would happen.

Senator SPECTER. Which authorities did you bring that to the attention of?

Mrs. JONES. I brought it to the attention of the police department in Baltimore County at that time.

Senator SPECTER. What action did they take?

Mrs. JONES. They took no action whatsoever.

Senator SPECTER. Do you know why?

Mrs. JONES. No, sir, I don't. I do not know why. As Mrs. Smith has said, why aren't our authorities moving to protect our children?

If I may continue, it gets worse, unfortunately.

Senator SPECTER. Please do, yes.

Mrs. JONES. During our divorce hearing in 1981, with all the children were going through and refusing visitation, my son paranoid at this point, me being told he might be institutionalized, doctors encouraging the visitation to please the court by saying, "Force him out on the front porch. At least have him talk with his father. Maybe that will appease the father." My son would come in with his face picked and bleeding, in fear; my daughter out there——

Senator SPECTER. You say he came in——

Mrs. JONES. My son would sit on the porch to talk with his father, if I pushed him out the door and shut it, watching from a window to make sure they were OK, he would sit there and pick at his face while his father talked to him, and then come in with it bleeding.

Senator SPECTER. As a result of picking at his own face?

Mrs. JONES. Yes. I brought this to the attention of the doctors and attorney. Nothing could be done.

When we went to court in 1981 for the divorce, the children talked with the judge, who happened to be a special court of appeals judge, Judge Allan Wilner, who was sitting in for the summer. The children spoke to him in his chambers, privately, no witness there, of the physical abuse that had been going on and the threats that were being made. The judge came back into the courtroom and spoke of what the children said, but said he really did not believe them. He told my husband to be more cautious with his actions with the children.

Senator SPECTER. Did the judge say that in the presence of the children?

Mrs. JONES. No; he did not. He told the children that they had to try to make visitation work. He told them that they had to go for at least five times, and that if after the fifth visitation time, it was still not working, or if they had any serious problems, he wanted them to contact him personally, and he would take action. They later tried, through myself and Mr. Hattaway, to contact the judge, but Judge Wilner refused to see or hear them.

Senator SPECTER. Did you tell the judge about what you saw your daughter do, which was corroborative evidence?

Mrs. JONES. I was told at that time that was not allowed into court, because I had nothing to prove it; all I had were actions that were not considered sexual abuse.

Senator SPECTER. Who told you that?

Mrs. JONES. I was told that by the attorneys that I had.

Senator SPECTER. Did your attorneys seek to have your children testify concerning what happened to them?

Mrs. JONES. That is correct. Mr. Brian Hattaway, of Bragel & Bragel, was representing us then. He had asked the court to appoint an attorney to the children, which the court did, a Mr. Barry Meinster. The children had spoken to Mr. Meinster about the physical and emotional abuse that was occurring at this point, but not the sexual.

Senator SPECTER. Why not about the sexual issue?

Mrs. JONES. My daughter had not come forth with the sexual abuse that had been going on. All she would say at that time was, "I have to deal with Daddy; you don't." That is all that she would state.

They considered french kissing and sleeping in bed with their father not sexual abuse—not enough that the authorities would take any action.

Senator SPECTER. Who considered that——

Mrs. JONES. At that time, the attorneys. Later protective service workers and the police.

Senator SPECTER. The attorneys told you that french kissing and sleeping with the father was not sexual abuse?

Mrs. JONES. Yes. It would not be handled in court as sexual abuse. I had not a legal right to stand on—and also, that the physical abuse was something that they could not do anything about.

Getting back to the fact that the children were appointed an attorney, a Mr. Meinster. The children spoke to him of the physical and emotional abuse they were encountering. In coming into court, Mr. Meinster brought none of this to the attention of the court. The children did speak. My attorney asked to have them speak to the judge in his chambers, as I stated; the judge coming back, saying he did not believe them. My ex-husband is represented, and has been through our problems, by a Mr. Dana Levitz, who is a State's attorney in the Baltimore County State's attorney's office. He, I understand, up to a year or two ago, was a prosecuting attorney in child abuse matters. His immediate boss is a Mr. Howard Merker, who is right under Sandra O'Connor, and I bring those names up as they will come out as I talk.

The judge had told the children to go five times to try to make it work, and if not, to get back to him. My ex-husband was again granted liberal visitation rights by the judge.

Dr. Robert Blatchley came in behalf of my son, and reported his emotional state to the court and suggested to the court that my ex-husband should have therapy if the court decided to order visitation, as well as for my son to continue. The court disregarded his advice, and did not order therapy for my ex-husband.

Then, in late October 1981, my son was taken on visitation by force. He was picked up as a sack of potatoes, thrown into the car; my daughter began beating on the door, "Let me in"——

Senator SPECTER. Who picked him up like a sack of potatoes?

Mrs. JONES. My ex-husband.

Senator SPECTER. I see.

Mrs. JONES. He threw him in the car, ran around, and got in.

I was upstairs making beds, thinking all was well, until I heard the screaming outside, in the winter, cold outside. Looking out the window, I am watching this occur. My daughter is banging on the door, "Mommy, Mommy, Mommy, please let me in, please let me in. No, I'm not going with you. Please let me in." The whole neighborhood could hear, she was screaming so loudly.

He was returned late that Sunday evening—this was a Saturday morning——

Senator SPECTER. So the father took only the son, not the daughter, on that occasion.

Mrs. JONES. Yes.

He returned and talked about having to sleep in bed with his father, of being thrown on the floor for about an hour's time, not allowed to get up off the floor, being verbally and physically abused, threatened. He came in Sunday evening, telling me this.

I contacted my attorney and wanted a hearing with the judge. I had had it by then; I could take no more. I said, "I will camp out on somebody's doorstep, if you don't."

Also, there was a custody hearing that was to occur, because my ex asked for custody during the divorce hearing, and I was told to obtain an attorney for that hearing.

Only because I protested so loudly did I get an appointment with the judge. Before meeting with Judge Wilner, I had terminated my attorney, because he had told me that I should beat the children, make them go with their father, and discount anything they might say. I felt he was not hearing us, and this would not be helpful to us. I saw Judge Wilner in his office, along with my ex-husband and his attorney, Dana Levitz. Mr. Levitz was there for some of the stay, and then left. I tried to explain to the judge the kinds of actions that were happening on visitation, as far as the physical and emotional part was concerned. I was interrupted to be told, who was I to tell him; who was I? I am just a woman. I am just a mother. He said, "You are just a mother. I am the judge. Who has more experience here?"

I have more experience here, and I will tell you that these children——

Senator SPECTER. When did this happen?

Mrs. JONES. This happened in November 1981.

He said, "I have more experience at this. These children are lying. Can't you see they are lying? They are pitting you against your ex-husband."

My ex-husband denied all the allegations that I brought before him, and the judge gave him additional visitation rights during the week.

I then had contacted the woman who was to do the investigation on the custody matter.

I had obtained an attorney in December, Mr. John Denholm. I asked him to please get this into a different court, that the judge was prejudiced and was not hearing what was happening to the children, and of the emotional state of my son, and now my daughter involved in it—by this time she is worsening. And he assured me this judge would not hear my custody case; that that is not heard of—especially a judge who is just filling in. This was in December of 1981.

In March 1982, he was notified that Judge Wilner had asked to sit in on this case and to be the judge in this matter. He was quite floored at this. He talked with the woman, Mrs. Boyce, who was doing the custodial investigation, at which time she told him that she was going to state that she felt that I, the mother, should continue with custody of the children and that therapy should continue.

When we got into court, her statement had changed. It was my attorney's opinion that—well, it was brought out in court that someone had contacted Mrs. Boyce, saying that he was my attorney, and confidential information was exchanged in the conversation, so her testimony was discredited from court, at which time she said she felt that the children should go into a foster home and not be allowed in my custody.

The hearing went on. I had three psychologists come at that time to speak in behalf of the children. I had a Dr. Virginia Blatchley, a Dr. Stuart Burman, and again, Dr. Robert Blatchley. My daughter was seeing Stuart Burman; my son, Robert Blatchley, and I was seeing Dr. Virginia Blatchley, to kind of bring into one focus with one person the therapy with the children, and how I as a mother, supporting the children and trying to help them, could handle this matter.

We went into court in May 1982. They testified in the children's behalf, again advised the judge strongly that therapy was needed for my ex-husband, and again, it was ignored. Again stating there was no bond between father and children and never appeared there ever was one. The judge found me to be an unfit parent. He felt that it was I who was causing the problems during visitation.

My daughter was not coming forth to the psychologist on the sexual abuse, even though I brought my suspicions to his attention. He said without her coming forth with it, he could not come out with it, either. He said he would need to see my ex and daughter together before making such a statement.

Senator SPECTER. Your daughter would have to come forward with the specifics before the psychologist could testify?

Mrs. JONES. Yes; that was what I was being told.

Senator SPECTER. Was she available to testify about it at that time?

Mrs. JONES. Yes; and Mr. Denholm asked the judge to speak with the children in this hearing, and the judge said, "No; I do not want to speak with the children. I already know what they are going to say. No; I won't speak with the children."

Senator SPECTER. So the request was made to have your daughter testify about the contacts between her father and herself and the judge——

Mrs. JONES. About the french kissing and sleeping in bed, and again, the physical and emotional abuse.

Senator SPECTER. I see, because at that time, you did not know the rest of it.

Mrs. JONES. Yes; that is correct.

Senator SPECTER. Was there ever a point where you knew about the full range of the contacts, as your daughter had described them to you, between her father and herself, and the judge declined to hear that?

Mrs. JONES. Yes.

Senator SPECTER. When was that?

Mrs. JONES. That was in February 1983, when she came forth. It was on a Sunday evening. I called the police department, as I had—if I may back up to get to that, to show you the consistency of this.

In May, we had that hearing. I was on a 60-day probation period, at which time, I learned later that my daughter was sexually abused during the 60 days, enormously. Both children were being threatened that they would never again be returned home to me.

In August 1982, we had the final custody hearing, at which time, Dr. Leon Rosenberg, who had evaluated the children—he is from Johns Hopkins—came in their behalf. And after bringing 15 pages of who he was and what he was, and a written evaluation of the

children, as well as a verbal report, the judge did grant me custody of the children, but again stated that he felt that I was the one who was causing the problems with the children, and not the father, and that if I did not allow visitation to occur, I would lose custody of my children. Only hopitalization of the children would be allowed as a reason for the children not having to go for visitation.

Senator SPECTER. Who told you that?

Mrs. JONES. Judge Allan Wilner.

The children were also threatened in May, that if they did not go on the 60-day probation period visitational time, which was extensive, that they would lose me as their mother, as their custodial parent, and under that threat, they went, each time they were told to go. I did come out with custody, and visitation was extensive, as for a family where parents and children have a fine, good, healthy relationship—meaning every weekend, Friday\ through Sunday, overnight, every holiday, and 2 weeks in the summer, as well as contact during the week.

In September 1982, my daughter was taken by force. The children had been refusing to go; their conduct was deplorable. My son was practically failing in school. My daughter, who is an A student with a very high IQ, and quite articulate, is stealing since second grade, getting low marks in school, lapping food off her dinner plate instead of using her silverware. They are not willing to go on visitation.

I asked a minister, whom we knew, to come and talk with my ex-husband on this visitation day, to help clear this matter up, since I was getting no help through doctors or the court. My ex, at this conversation, who appeared very calm, very calmly said, "I am feeling very violent and angry," at which time he grabbed my daughter, in what has later been described to me as a "Nelson"—he grabbed her by the throat at the Adam's apple, and drag her to the car and sat on her.

Senator SPECTER. Who did that?

Mrs. JONES. My ex-husband.

I then was advised to call the authorities. My son ran and hid in an abandoned yard, as he put it later, "Next to animal poop," and lay there for 20 minutes, for fear he would have to go.

I contacted my attorney——

Senator SPECTER. Were those events called to the attention of the court?

Mrs. JONES. I called my attorney. My daughter was returned home late that Sunday evening with bruises and marks on both forearms. She described the visitation, told me that she had seen her father and his girl friend having sexual intercourse in bed during the day, and had watched it.

Senator SPECTER. Was there any effort by your ex-husband to have any sexual contact with your daughter at that time?

Mrs. JONES. She did not bring it up on that particular visitation, whether he had sexual contact with her then or not.

I called the attorney and he said to kind of disappear for a few weekends until he could get it in court. Well, he also was a State's attorney, only in the Baltimore City court system. Mr. Kirk

Schmoke had come into office, and Mr. Denholm was no longer allowed to have a private practice.

I then employed Rosalyn Soudry, and asked her to please get the matter into Baltimore City court as soon as possible, that the visitation could not continue this way. Ms. Soudry made a motion to get it into the city court, at which time, Mr. Levitz contacted her and said it would not be heard in city court, he would get it back into Baltimore court. There was no question, Baltimore County court.

Senator SPECTER. Who said that?

Mrs. JONES. Dana Levitz, the attorney of my ex-husband, who is the State's attorney in Baltimore County.

Senator SPECTER. You are saying the State's attorney of Baltimore County was handling this case privately for your husband, in a private attorney capacity?

Mrs. JONES. Yes, yes, he was.

Senator SPECTER. And he is the State's attorney?

Mrs. JONES. He is a State's attorney within the Baltimore County State's Attorney's Office. He is a prosecuting attorney for the Baltimore State's Attorney's Office.

Senator SPECTER. Is he an assistant State's attorney?

Mrs. JONES. Yes, he is.

Senator SPECTER. But they are permitted to have private practices of law?

Mrs. JONES. Yes, they are, but not to conflict with their job with the State's Attorney's Office. In this case, it is definitely conflicting.

Senator SPECTER. Was there ever any contention raised, formally or informally, by you or your attorney, of that kind of conflict?

Mrs. JONES. Yes; getting to that, we never did get into court. I filed charges of assault and battery in Baltimore City. I went to the police department, only to be told to go to district court to get permission of Judge Bundy.

Senator SPECTER. Assault and battery against whom?

Mrs. JONES. Against my ex-husband, for the bruises and the manner in which he took my daughter in September 1982.

In September 1982, the school had made a report to Baltimore County of suspected abuse of the children by their father. Weeks after making this known to the system, the officers from the child abuse unit of the Baltimore County police department visited my home, shortly after this incident had occurred in front of our house, to which I had an eyewitness, the minister. They said there was nothing they could do on that particular incident. My daughter then explained the french kissing and the sleeping in bed with her father. My son confirmed it and also spoke of the physical abuse he had been incurring all along.

They said there was nothing they could do. Unless my daughter came forward with actual rape, there was nothing that they could do. They said they weren't concerned with the physical or emotional abuse. Shortly after that, Baltimore County Protective Services worker, Emily Steimke, came to our house. Again, the children told what had been happening, my daughter not elaborating any further than this. Ms. Steimke also stated there was nothing Protective Services could do. Baltimore City Protective Services, as well

as Mr. Ronald Bacon of Neglect, came to my house. There was nothing they could do.

Mr. Ronald Bacon, from the Neglect Department of Baltimore City, said he was going to have to file papers against me for being a neglectful parent for allowing the visitation to occur—even though he understood I was under court order to do so.

Senator SPECTER. What did your attorney say about all this?

Mrs. JONES. Nothing. At this point, I had spent $13,500 only in legal fees, not medical fees, which were amounting to $800 per month.

I went to file the charges on assault and battery by myself. I was told by the police department that I had to go to district court and get permission from a judge, which I did. I came back. They told me it would only be filed in a drawer. I then went back to Judge Bundy, and through the judge and the State's Attorney's Office in Baltimore City, was allowed to file the charges. The State's Attorney's Office in Baltimore City said that they were also going to charge my ex with sexual assault. They felt that the french kissing and the sleeping in bed warranted that.

Senator SPECTER. So by this time, the authorities were prepared to proceed with the charges.

Mrs. JONES. So they said, so they said.

Senator SPECTER. And what happened then?

Mrs. JONES. Nothing happened. In February, my daughter came forth with the sexual abuse. I called the detective I had spoken with in Baltimore County, Detective Mark Bacon, from the Abuse Unit. I went to see him that Monday evening with my daughter. She went into 2 hours of elaboration of the sexual abuse that had been occurring. In that interview was also Emily Steimke from Baltimore County Protective Services. The officer insisted that I get some sort of order that would prohibit visitation from occurring, that he had great fears for my children's safety. He wanted dates and times of incidences. He insisted on exact dates and times, besides what my daughter had quoted in the interview. All I could do was—I had been asked by all the attorneys to keep ledgers, diaries, of all the different things that were happening over the years, which I did, and through these, sitting down with the children and my father, going over visitation as I had recorded, the children would then remember things that had happened, and my daughter would state that she could remember that to be an incident where the sexual abuse took place, and I gave the dates my daughter's statements, and times to the police officer, Detective Mark Bacon.

The police officer did not contact any of the psychiatrists or psychologists involved, nor the Sexual Assault Counseling Unit in Baltimore City, where my daughter was then in therapy——

Senator SPECTER. What happened to this complaint? What happened as a result of your bringing this matter?

Mrs. JONES. My ex-husband was called in for an interview with the detective. At that time, he brought to the detective's attention that he should contact Judge Wilner and Mr. Levitz, which he did. They are the only people——

Senator SPECTER. Was your husband still represented by an assistant State's prosecutor at this time?

Mrs. JONES. Yes; he was.

There were no other persons contacted in this investigation in behalf of my daughter, only the judge and the particular attorney in question. My ex was given a polygraph test, which they say he passed with flying colors. The officer then came to my daughter's school that Friday and interrogated her. I understand the ruling in Maryland to be that when an officer wishes to speak to a child in this manner, unbeknownst to the custodial parent, he has to talk with the principal of the school, have someone present with the child whom the child knows and feels secure with. He did not do any of these things. A man who tells me he is thoroughly trained in this area talked with a secretary, who is only in the school on Fridays. He had the school nurse come in—the school was new to my children at this time—they came to IHM in September 1982—and the nurse did not know my daughter personally. In the interview he started out with, "Hello. I spoke with your father. I gave him the test that tells me he is telling the truth. I have canceled the warrant for his arrest. He is not going to be arrested. Do you know what that means?"

My daughter said, "Yes, I do. It means he is not going to be arrested."

The officer, knowing the threat she had been under, knowing her fears of being taken away, of being beaten so severely that she would not be able to even see, tells her this, and then made her in front of the school nurse go into explicit detail of the sexual incidences that had been happening since she was 7 years old.

Then he began, "Are you lying? Are you lying? Are you lying because your mommy told you to say these things? Are you lying? Are you lying?"

This continued until she felt she could handle no more and finally said, "Yes, sir, I am lying."

He said, "Thank you for being an honest little girl," and sent her back to her classroom.

Senator SPECTER. How long did that last, if you know?

Mrs. JONES. For about a half hour.

I talked with the school nurse to confirm what my daughter had said about the interview, and she said that was basically how it was handled. He had a very sugarsweet tone of voice——

Senator SPECTER. What is the name of the school nurse?

Mrs. JONES. I do not have that handy. It is in my report which I gave to Ms. Westmoreland.

The officer called me that evening and told me that the warrant was not being issued, that nothing was going to happen in this case, and that he felt I should contact my daughter's therapist, that she was very disturbed and needed to see him immediately.

Senator SPECTER. About when was that call?

Mrs. JONES. That was in the first or second week of March 1983. The date and time are in the manuscript I presented to this committee.

Senator SPECTER. Could you summarize what has happened since, because we are starting to run very long.

Mrs. JONES. OK. Since then, I have been to see Sandra O'Connor personally. She understands the situation. She admitted that therapy for my ex-husband is out of the question because it would not help.

Senator SPECTER. You have been to see whom?

Mrs. JONES. Sandra O'Connor, State's attorney for Baltimore County.

The warrant for his arrest was canceled by a Mr. Howard Merker, who is directly under Sandra O'Connor, and is Mr. Levitz' boss, immediate superior, and was not canceled through Mr. Lazero's office, as is normally handled. Ms. O'Connor said that the case will not be held in Baltimore County, that she will not prosecute a case in her court that is questionable, or one that she is not 100 percent sure of winning.

Through Baltimore City, again—as in Baltimore County—they were asked by my ex on that case to contact Judge Wilner and Dana Levitz, which they did, and that case has been dropped. Their decisions on abuse totally changed. And from a Mr. Alexander Palenscar—Baltimore City State's attorney's office—I have a letter that states in his opinion that my daughter's statements could be impeached.

I have called and been seen at the Governor's Task Force on Child Abuse and Neglect.

I have given to the Governor's task force this manuscript, which I have presented to this committee. I presented proposals of what I think Maryland might need and asked them to work on that issue. I have lobbied on child abuse bills there. Unfortunately, two of the five bills were not passed into law.

I have written a letter to the Governor, who stated I should continue through the courts. Judge Allan Wilner has stated to both Baltimore County and Baltimore City State's attorney's offices, as well as to other officials, that I am emotionally and mentally disturbed and that if I continue my pursuit in trying to protect my children that I will lose custody of my children, that my ex-husband—the abusive parent—will have custody, and that I will go to jail. This is stated as also being said by Mr. Levito.

I have been told that if I took proceedings against the attorney—Dave Levitz as well as the judge—Allan Wilner—that not only would I go to jail and lose custody of my children, but I would also lose any possession that I might own.

Senator SPECTER. Who told you you would go to jail?

Mrs. JONES. I have spoken to the Maryland Lawyers' Referral Services, a Susan Gainan; this was told to me by her. This was also told to me by the University of Baltimore Legal Clinic, and also by a Mr. Charles Rand an appelate attorney, and by an attorney within the Baltimore City States' Attorney's office.

Senator SPECTER. Did they tell you on what basis you would go to jail?

Mrs. JONES. There seems to be political involvement. It has been stated to me by a States attorney within the Baltimore City States attorney's office—who has asked to be anonymous because of threats to his job—and by above mentioned that a false charge of denying visitation would be charged.

Senator SPECTER. Well, let me summarize and see where you stand now, with respect to all the matters.

No criminal charges have been brought against your ex-husband.

Mrs. JONES. They have been refused. I cannot bring them. Neither Baltimore County or Baltimore City officials will hear them.

Senator SPECTER. And does your ex-husband still have visitation rights with the children?

Mrs. JONES. Yes, he does.

Senator SPECTER. And how often does he see your children?

Mrs. JONES. He has not seen the children since the September incident, September 17, 1982. He has made himself known to us through phone calls to the children which are quite frightening. He has made himself known to us by visiting people that we know and making allegations.——

Senator SPECTER. Does he support the children?

Mrs. JONES. He pays his child support, but plays the game of holding it up enough to cause great financial need for me. This is explained in the manuscript.

Senator SPECTER. How is your daughter now?

Mrs. JONES. My daughter is still in counseling; now with a sexual abuse counselor. I have found, as many people in my situation have, that many psychologists and psychiatrists are ignorant on this particular subject, and because of their ignorance on it, cannot handle the matter, and they will just push it over and tell you that it will all go away one day.

Senator SPECTER. How is your son now?

Mrs. JONES. My son, after counseling with a Dr. Michael Fox, has done a complete turn-around since there has been no physical involvement with his father.

Senator SPECTER. He seems to be OK?

Mrs. JONES. He is doing much better. He is still paranoid, and he still carries a great deal of anger.

Senator SPECTER. Dr. Bersoff, let me ask you a question, if I may, at this point. What is your evaluation to the extent that you have had experience with such matters, as to the long-term impact on the 3- and 4-year-old daughters that Mrs. Smith has testified about, and the 11-year-old daughter and the 12-year-old son that Mrs. Jones has testified about?

Dr. BERSOFF. Certainly, on the short term, there are serious consequences, as both of these mothers have testified. In the long term, for a large minority of children, there are chronic problems that stay with them throughout their lives.

Senator SPECTER. Are they likely to become abusers of their own children?

Dr. BERSOFF. Well, that certainly is a possibility, if there is no intervention and no attempted treatment.

Senator SPECTER. How likely is the treatment to be successful, given these case histories?

Dr. BERSOFF. Well, again, in any particular case, you cannot say. We hope that there will be some help——

Senator SPECTER. In any particular case, you cannot say. To what extent can you say that treatment is helpful——

Dr. BERSOFF. Well, generally, if you do have treatment with somebody who does know about the problem, who is not afraid to confront it and talk about it with children, there can be amelioration over the long term, although there still are problems with relating to other people; especially children who have been abused have trouble in their marriages and with sexual relations.

Senator SPECTER. And what is the likelihood of alcohol or drug dependency?

Dr. BERSOFF. That, I do not know.

Senator SPECTER. What is the likelihood of criminal careers themselves?

Dr. BERSOFF. That is unlikely. The basic consequence is sort of the same kind of thing that you see when women have been raped. There is trauma, there is social withdrawal, and it is mainly social problems and relating to other people that are the major consequences.

Senator SPECTER. But that is a single incident compared to a course of conduct that has been described here today, and it is also different to the extent that it is ordinarily on mature women, at least women beyond the ages of 3, 4, 11 or 12.

I realize there are no absolute answers. I just wanted to explore those questions with you.

Mrs. Smith, do you have anything you would like to add?

Mrs. SMITH. Yes, I would like to add one thing. Rape is rape, whether done one time or 100 times.

It seems to me that everybody is terribly concerned with the abuser's rights, and no one seems to be concerned with the children's rights.

You mentioned that it was unfair for a child to be questioned without the abuser present and what about the father's rights. What about the right of the child not to be emotionally terrorized and not to be physically abused?

And if it means finding another way to interview children, if it means videotapes, which I have requested myself and been told, "Forget it, we won't even use it"—something has got to be done.

Senator SPECTER. Well, that is what we are searching for. We are searching for some way to protect the victims, to protect the children, to protect the women who are rape victims, within the legal system we have, which does have the right of confrontation, which I was discussing briefly with Dr. Bersoff.

Mrs. SMITH. But we are victims, and we are victiminized again and again and again. And in our cases, we are victimized every week, whether that man shows up at our doors or not. We are victimized through phone calls, we are victimized through threats, and our children are emotionally terrorized. They cannot grow when they are being emotionally terrorized.

Thank you.

Senator SPECTER. Mrs. Jones, do you have anything you would like to add?

Mrs. JONES. Yes. We have also been told in our situation that, because of visitation rights being in effect and the judge refusing to even consider this matter as what it is, that the abuser has the right to take the children for 42 hours from anywhere, and not one soul in Maryland will lift a finger to protect them. Our children live with this fear every day, wondering if he is following them, will he come and take them, riding their bicycles, looking over their shoulders to see if he's there, at the school playground, taking a letter to the mailbox—normal things that children should be allowed to do, the freedom to move about as a child without this fear is denied to them.

Children are still seen as property. They need to be seen as human beings, regardless of their age. They have the same right to respect as adults have.

We have talked here, about videotaping. Within my manuscript is a whole proposal of what I think could possibly help our system and society in understanding this problem better and handling it better. To me, it is an ignorance and that people have a need to be educated in order to understand the severity of it.

Senator SPECTER. Mrs. Smith, Mrs. Jones, Dr. Bersoff, thank you very much. Your testimony has been very enlightening.

I would suggest to you that you persevere in bringing the evidence to the decisionmakers, and keep pressing to bring the knowledge to the attention of the judges who have to decide these cases and to the attention of the prosecuting attorneys. Evidence is the decisive factor in our judicial system; what people say happened to them. And if you are discouraged by your attorneys, who tell you that the evidence will not be heard, press on, because cases are decided on evidence. That is the way to get cases decided. And if anybody in the process, including your attorneys, may be timid, do not be put off. You have a right to an attorney of your choice, you have a right to change attorneys, and you have a right to manage your own legal affairs in the final analysis. And what is the most critical aspect is to present the evidence, and that is what you have to get an opportunity to do.

Mrs. JONES. May I ask one question?

In my case, I have seen just about every attorney in the State of Maryland, and I have been denied the right to persue, because they will not handle my case because of its complexity and my lack of financial funds.

What does a mother do then—and when I can't get a judge changed, I have to be heard by the same judge who shows himself prejudice. What does a mother do then? Again I ask that my manuscript be read by this committee.

Senator SPECTER. Well, you cannot get judges changed. There are rules about that. With respect to recusal of judges, that is a matter for the discretion of the judge, and it is very hard to get that overturned on appeal. Ultimately, it can be done. I understand that you have been to many attorneys, and it is not easy, and it is very expensive and very complicated, and the appellate process is enormously involved.

I think that you are pursuing the matter, as you have taken the matter from one attorney into the hands of another. I am not familiar with the variety of agencies which are available to you in Maryland, but I do know that there are agencies, and there are lawyers, who do take cases and do persevere. Thank you all very much.

I would like to call now Judge Eric Younger and Deputy District Attorney Kenneth Kobrin.

Gentlemen, thank you very much for joining us here today. I appreciate your being here, and I appreciate your having heard the testimony, because you men are experienced in the field and perhaps you would have some light to shed on some of the issues which have already been raised.

Judge Younger, let us begin with you, if we may. You have had a very distinguished career, having graduated from the Harvard Law School. You have practiced with the very distinguished firm of Gibson, Dunn & Kretscher in Los Angeles; 3 years with the California Department of Justice, and appointed to the Municipal Court of Los Angeles in 1974; elected to the superior court in 1980. You are the former chairman of the American Bar Association Committee on Victims, and you are celebrating your 10th anniversary as a judge today.

So we welcome you here, and we would like to hear about the case of *Robert Moody,* the circumstances, and your own sense of the situation.

STATEMENT OF HON. ERIC E. YOUNGER. JUDGE, SUPERIOR COURT, POMONA COUNTY, CA, AND HON. KENNETH KOBRIN, DISTRICT ATTORNEY, SOLANO COUNTY, CA

Judge YOUNGER. Thank you very much, Mr. Chairman.

Near dawn on March 18 of 1983, Robert Ira Moody was raging and screaming and very much under the influence of the drugs that he apparently used nearly every day. He dragged his wife out of bed and demanded oral sex from her. She refused, apparently, according to her testimony, due to his condition.

A fight spilled over into the kitchen, and Robert Lee Moody their son, called the sheriff's department. The son begged the deputies to take the father away, but the mother basically refused to press charges, as would generally be required in a misdemeanor situation.

After the deputies left, at the insistence of the mother, the father told the son that he was to be out of the house by 6 in the evening, or that he would kill him. The young man began to make preparations by gathering up his possessions, but he made other preparations, too. He prepared to kill his father.

The evidence indicated that Robert Ira Moody began molesting his oldest daughter in her prepuberty years. The conduct apparently went on for some time, but I cannot be very precise, because she disappeared years ago. She was not available to testify.

He then began molesting a second daughter, now in her early twenties, and she did testify to several incidents in front of me. Only after the trial was over, I learned that Mr. Moody had raped his sisters as a young man.

On two different occasions, the second daughter went to the authorities after school officials finding out. And an element which I think shocks the public, Mr. Chairman, but with which your subcommittee is doubtless familiar, is the somewhat textbook way in which action by the sheriff's department was thwarted. In each situation, the daughter was forced to recant her story by an at least overtly unbelieving mother, and notwithstanding that the deputies testified in front of me that they had believed the whole thing and badly wanted to prosecute, they simply had no evidence, because the daughter ultimately told the detectives that she had made up the whole story to get her father into trouble.

I would note in passing that the inability of prosecutors to proceed with a case by impeachment of their own witnesses is not a

legalistic problem in California, as the Attorney Generals' Task Force on Family Violence last week indicates that it is in many States. But I think you as a former D.A. can appreciate the issue of just how realistic it is to think that a case can effectively be presented when a person who is the critical witness is denying that the very conduct occurred. The law is one thing; practicalities are another. You can appreciate the situation in that case.

A third little girl, now 12 years old, was just being introduced into the father's sexual practices by fondling and french kissing her and requiring her to view hardcore pornographic movies with the father.

Much has been said of the widow, Mildred Moody——

Senator SPECTER. Could you repeat, Judge Younger, what the situation was with the father compelling the daughter to view hardcore pornographic movies?

Judge YOUNGER. Yes. The testimony was—and this is bizarre, Mr. Chairman, but I can tell you that several witnesses testified to it—the father had a library somewhere in the neighborhood of 400 hardcore pornographic films. Samples were brought to court, and if you can judge a book by its cover, as it were, they were pretty rough, even by the standards of my line of work. Family members were required to attend viewings, and as the young man, ultimately my defendant, turned to the Bible, as he did at one point, there were incidents in which he was overtly dragged away from the Bible and on in for the family porno viewing. That is strange, but that was the evidence.

Senator SPECTER. What work was the elder Moody in?

Judge YOUNGER. He was a machinist, and by the way, contrary to some of these situations, I think, was gainfully employed over a period of years, and supported his family. This was not a street people situation.

Senator SPECTER. 400 pornographic movies?

Judge YOUNGER. That is what the testimony was from several witnesses.

Senator SPECTER. And you saw some of them?

Judge YOUNGER. I saw the boxes. I did not see the films. In my line of work, I have really seen about as many as I can handle, but if the boxes were representative, they were hardcore by anyone's standards, I think.

A lot of people have talked about the widow, though, Mildred Moody, and I think the public often feels that she was the truly guilty party in the situation. She knew about it, allowed it to go on. We have to remember that she was beaten more times than you can count, and threatened with death routinely, by a person who was probably good for it, one has to realize. She was required to teach the children, in her husband's way, by having sex in front of the children. Her husband had introduced her to prostitution, which she accomplished on an out-call basis from the family home. That was a means, interestingly, of earning extra money for family projects, such as the boat being built in the front yard of the family home.

Whether it has some deep Freudian significance or just sort of a literary kind of irony, the young man laid in wait with a shotgun

and killed his father from that boat in the front yard. That is where it happened.

Senator SPECTER. How long after the incident that you have described where Robert Ira Moody was raging and screaming did the killing occur?

Judge YOUNGER. The prosecutor still emerges in that question. It was about 12 hours, so "self-defense," "defense-of-others" issues, and so forth, were not really "live" at that time. He had all day to deliberate and premeditate, and all of those kinds of things, if I anticipate the significance of your question.

But it would not be correct to say that sexual aberration was the dominant characteristic of the father here, as much of that as there was. I would define that more as a kind of tyrannical control of everyone he could get his hands on, by violence and threats of it. It took a lot of nonsexual forms as well. There does not seem to have been any overt sexual conduct in the violence against his sons.

One boy, who is now 25 years old and institutionalized, was routinely beaten with tools and so forth—the press, in some of these accounts that you or your staff may have seen, indicated that he was institutionalized because of having his head bashed in with a hammer. I cannot honestly say the evidence supported that.

The young man who did the killing was not, so far as I can tell, significantly physically abused. The word "significant" is important when dealing with this man. I am sure he was knocked around from time to time, but there was not a lot of physical abuse.

Another element which struck me as very odd about the whole family situation when I actually heard it—though, again, I think the subcommittee has heard things like this—is that the family members loved the man. Even Robert Lee, within minutes of testifying to me that he killed him with a shotgun, spoke of his love for his father. Mildred Moody was more than just dependent on him. She stayed with him for years, and there was a lot more than fear in that. I have no question about her testimony that she loved him.

In any event, in January, the case of the people of the State of California versus Robert Lee Moody came to me for trial. The charge had been reduced to manslaughter by the district attorney, and both he and defense counsel waived their rights to a jury trial. I was asked to resolve the single question of whether the young Moody was insane at the time of the fatal shooting, it being admitted that he pulled the trigger—that really was not an issue.

I found the young man guilty of voluntary manslaughter, but in setting the matter over for sentencing, indicated that under the circumstances, I was leaning away from a prison sentence, though an 8-year term was a legal possibility at that point.

While sending a young man with no criminal record whatsoever who had killed under these kinds of circumstances did not seem awfully sensible, it was certainly necessary to proceed with very great caution, lest anything seeming to be an endorsement of patricide as a way of solving problems come out of that heavily publicized case.

I had for some time been a proponent of community service sentencing, and as a coincidence, had testified on that subject right

here at this table some years ago, but had certainly never remotely considered that kind of option in an intentional homicide case before. If you had asked me 6 months ago if such a thing were possible, I would have said "No," I suspect.

Every journalist who has interviewed me has asked where I got the idea of having Mr. Moody perform public service in an impoverished country, and the answer is terribly simple. I got the idea from the defendant himself. In his statement in the presentencing report, he spoke of his newfound commitment to God and his desire, if he ever got the chance, to "help the poor people of the world."

Press accounts suggesting that he was sentenced to do missionary work miss a fundamental point, I think. No American court has any business involving a person in a religious effort as part of a sentence. That poses first amendment problems, which are of course abundantly obvious. My objective was only that he work, perhaps even suffer for some years, without actually being in prison. He is now in the middle of about a 5-month training program and a seven-day-a-week resident of the Youth With a Mission Training School in southern California. That is an organization with some 50 offices around the world, and missions all over the planet. He sees a psychiatrist acceptable to me once a week, and although it would be improper, I think, for me publicly to discuss feedback from the doctor, I am not uncomfortable with the way things are going at this point.

When he finishes his training program, he will go at his own expense to the Hong Kong area to work in a camp for Vietnamese boat people for a minimum of 2 years—that is out of a 5-year probationary term. I defined the requirement from the bench as "2 years of blood, sweat, and darned hard work," and specified that if he wants to preach the gospel on top of that, that is fine, but that that was not any part of the court sentence. The head of the missionary program, has assured me that they will honor that condition, and that they will assure me that that happens. And I think they are sound folks; I am quite sure they will do that.

I think that no one sentencing felons, even in the odd circumstances of this case, has any business assuming that everything will be OK. It is often not, and we take the responsibility for danger to the public every time we give anyone 1 minute less than the maximum sentence. Mr. Moody presents risks. While we all hope that his behavior was situationally limited, he deliberately killed a fellow human being with a shotgun, and accordingly, must be carefully watched.

I think the greater risk from my standpoint, though, perhaps exacerbated by my being in a situation like this today, is that he will be perceived somehow as being "forgiven" for shooting someone, and that this very much publicized case will have some sort of reverse deterrent effect on troubled young people—in other words, some sort of notion that it is OK to kill if you pick someone that is really bad. And that scares me a lot.

In closing, I think a word on the public's reaction seems indicated. Due to a mistake in one press account, with which you and the staff are quite possibly familiar—and it got picked up in a wire service, so it became more of a problem—the public was led to be-

lieve that I was seeking suggestions on how to sentence the defendant. Now, while that was in error, it has been interesting to see just what people have had to say, and I have received about 2,500, give or take a couple hundred, letters at this point from all over the Western Hemisphere. In what we would all probably agree to be a period of concern for violent crime and attendant demand for stiff sentences, I think, all over the country, I can tell you, Mr. Chairman, that well over 99 percent of the people who have written me have either endorsed the idea of the kind of sentence which I ended up imposing, or something less punitive; probably 40 percent indicating they did not feel anything should happen to the young man at all which, by the way, was never an alternative which remotely cross my mind.

One might quite properly ask, I think, what Senate hearings on juvenile justice have to do with this bizarre case, given that its combination of events make it so, I hope, unique. And I posed this question myself to Ms. Greenberg, then of your staff, when she first contacted me about this testimony.

There may, however, be an answer, and I would try phrasing it something like this. All the evidence says that family sexual abuse and violence are common. We have heard a lot about it this morning. We have heard they perpetuate themselves over generations and in thousands of settings, which never make any headlines or any committee hearings. As publicity is given to the acts of young people who fight back by taking revenge on parents—something over which the Congress and the courts have no control whatsoever—we must assume that this type of violence will increase and continue, unless the cycle can be broken.

And while the *Moody* differs from others in dimensions which attract the media, in most which are important from a policy standpoint to you and to me, it remains a textbook case in that aspect.

I would certainly be honored to answer any questions you have.

Senator SPECTER. Thank you very much, Judge.

Judge YOUNGER. By the way, might my prepared remarks, which I did not, believe it or not, read in their entirety, be entered in the record?

Senator SPECTER. Yes, they will be made a part of the record, in full. That is our practice.

Judge YOUNGER. Thank you, Mr. Chairman.

Senator SPECTER. The Juvenile Justice Subcommittee is concerned about the *Moody* case, for a number of reasons. It deals with the problem of sexual abuse of children, and we have responsibility for oversight on the Office of Juvenile Justice and Delinquency Prevention, which has the potential for some very substantial action in this field—Federal grants to work on the problem, to analyze it, to develop answers to the questions of competency of witnesses and the availability of counsel, which you heard Mrs. Jones testify about. And the consequence of the *Moody* case is what happens to someone who is involved in the sexual abuse of children, in a sense, Mr. Moody got capital punishment for his offense; he was executed by his 19-year-old son. And that is a telling circumstance, if that is one consequence of sexual abuse.

Judge YOUNGER. I think you put it in an interesting way, Mr. Chairman, and that is very much how the public has perceived it.

They see the son almost as a proper instrument of official policy. "Execution," I think, is the word for how they feel.

Senator SPECTER. Well, I do not see the son as an official executioner, but what I see is the father having been executed. And the difficulty comes in that capital punishment is too severe a penalty for mistreating children under our prevailing standards, but in any event, it is not up to a 19-year-old son to decide, himself, to be the executioner.

I have seen cases like this bring first degree convictions and life imprisonment, and I asked you about the passage of time; premeditation under the law, we both know, can be formulated in the twinkling of an eyelash. You do not need 12 hours to do it.

One question arises as to the filing of the charges. Of course, when they come to you as a judge, you deal with the case as it is presented, and my own sense is that you made a very judicious determination of it, in coming up with the public service resolution.

I am sure you—well, let me ask you. How hard did you deliberate on the imposition of a jail sentence?

Judge YOUNGER. Oh, I thought about it a lot, and——

Senator SPECTER. If you are willing to answer, Judge. I do not really have to ask you if you are willing to answer, if you see any encroachment upon judicial prerogatives.

Judge YOUNGER. I had to give a lot of "No comments" while it was going on; now that it is over, I can honestly say that I considered State prison, although a very modest term, as a very live possibility right up until the last minute. I had the basic sense that I think you are reflecting, that no matter what the provocation, you do not go around cold bloodedly killing people with a shotgun to try and work things out.

Senator SPECTER. Well, it is a fascinating case, and one which we will be studying for a long time. But I do appreciate you being here to give us your own sense of it.

Judge YOUNGER. Thank you, sir.

[The prepared statement of Judge Younger follows:]

Prepared Statement of Eric E. Younger

Near dawn on March 18, 1983, Robert Ira Moody was raging and screaming - very much under the influence of the drugs he used almost daily. He dragged his wife from the bed, demanding sex; when she refused, a fight spilled into the kitchen and the the Sheriff's Department was called by Robert Lee Moody, their son. Deputies pulled the father off his bruised and beaten wife and the son begged his mother to let the Deputies take the father away, but she refused, and the elder Moody told the son to leave the house by six that evening or he would kill him. The young man began to make preparations by gathering up his possessions, but he made other preparations, too:

He prepared to kill his father.

The evidence indicated that Robert Ira Moody began molesting his oldest daughter in her pre-puberty years. This conduct, apparently, went on for some time, but precision is not possible, as she disappeared years ago.

He then began molesting a second daughter, now in her early twenties. She testified to several incidents; only after the trial was over, I learned that Mr. Moody had raped his sisters as a young man.

On two different occasions, the second daughter had gone to the authorities because of teachers' finding out about the incest situation. An element which has shocked the public, but with which the subcommittee is doubtless familiar, is the "textbook" way in which action by the Sheriff's Department was thwarted. In each situation, the daughter was forced to recant her story by an at least overtly unbelieving mother and, notwithstanding that the Deputies testified in front of me that they had believed the events had occurred and badly wanted to prosecute, they simply had no evidence because the daughter ultimately told detectives that she had made the whole thing up to get her father into trouble.

I would note in passing that the inability of prosecutors to proceed with a case by impeachment of their own witness is not a legalistic problem under California law as the Attorney General's Task Force on Family Violence indicates it is in many states. Just how realistic it is to think that a case effectively can be presented with a person who is the critical witness denying that the very private conduct occurred at all is an issue deserving a skeptical look, however.

A third little girl, now twelve, was just being introduced into the father's sexual practices, by fondling and "french-kissing" her and requiring her to view hard-core pornographic movies with him and other family members.

Much has been said of the widow, Mildred Moody. Many people feel that she is the truly guilty party in the situation, and I'm certain the subcommittee is hearing a great deal about the implicit cooperation of mothers in many incest situations. Suffice to say that she had been beaten and threatened with death innumerable times. She was required to "teach" the children, in her husband's way, by having sex in front of them. Her husband had introduced her to prostitution - which she accomplished on an out-call basis from the family home - as a means of earning extra money for family projects, such as a boat being built in the front yard.

Whether it has great Freudian significance or simply a literary sort of irony, the young man laid in wait with a shotgun and killed his father from that boat.

It would not be correct to say that sexual abberation was the dominant characteristic of the father: I would define that more as a tyrannical control by violence and threats of it and note that it took many forms apparently unrelated to sexual issues.

There seems, for example, to have been no overt sexual component in the violence against his sons. One boy, now twenty-five and institutionalized, was the victim of repeated beatings,

sometimes with tools and other implements. One occasion involved an attack on that boy with a large screwdriver. While apparently a serious wound was iflicted on the boy's head, the implications in various press accounts that this injury caused the institutionalization were not supported by the evidence.

Oddly, there was no real evidence of physical violence against Robert Lee Moody by the father. There had, indeed, been problems between the father and this son, and it's hard to say how much of that was due to drugs: The son, as a mid-teenager certainly had some problems in that area, but, as the father encouraged and even occasinally forced drug-use by the children, I can't say how much of an issue it was. Robert Lee went to live in Arizona for a while, and indicates that, while there, he first formed some interest in religion and began to read the Bible. Upon his reurn to Southern California, his father frequently verbally abused him over Bible-reading and actually demanded that he put it aside for the porno movies, but I really heard no testimony that he beat Robert Lee.

Another element which struck me as odd when I actually heard it, though I know the Subcommittee is doubtless learning that it's quite common in child incest situations, is that family members loved Moody. Even Robert Lee, within minutes of testifying that he killed him with a shotgun, spoke of ~~testified to~~ his love for his father. Mildred Moody, too, was far more than just dependent on him. She stayed with him, with occasional separations, over many years. Indeed this was partly from fear of him, partly from dependence, but I have no question that her testimony that she loved him was true.

In late January, the case of the People of the State of California v. Robert Lee Moody came before me for trial. The charge had been reduced to manlaugher by the District Attorney and both he and defense counsel waived their rights to a jury trial; I was asked to resolve a single question - whether the young Moody was insane at the time of the fatal shooting, it

being admitted that he pulled the trigger. It should be noted that "self-defense" and "defense-of-others" issues were not really present, as the killing followed the violent confrontation of that morning by some twelve hours.

The young man was found guilty of Voluntary Manslaugher and set for sentencing, but I indicated that the totality of circumstances was pointing me away from a state prison sentence, though an eight-year term was a possibility. While sending a young man with no criminal record whatsoever who had killed due to such extraordinary provocation to prison didn't seem awfuly sensible, it was necessary to proceed with very great caution, lest anything else seem an endorsement of patricide as a means of solving problems.

I was already an enthusiastic proponent of Community Service sentencing and have testified on that subject in this building, but I had never remotely considered this sort of term in an intentional homicide case before.

Every journalist asks where I got the idea of having Mr. Moody perform public service in an impoverished country as a part of a probationary sentence. The answer is abundantly simple: I got the idea from the defendant, himself. In his statement in the presentencing report, Moody spoke of his new-found committment to God and of his desire, should he ever get the chance, to "help the poor people of the world."

Press accounts suggesting that he was sentenced "to do missionary work," miss a fundamental point: No American court has any business involving a person in religion as a part of a sentence; that poses obvious First Amendment problems. My objective was only that he work - perhaps even suffer - for some years, without actually being in prison.

Youth With a Mission, according to testimony in my courtroom, has extensive training facilities and a program of missionary operations in some fifty locations around the globe. Its

staff and facilites seemed ideal to me in providing a structured setting for Mr. Moody. This is something a judge often wishes for, but which resources avilable rarely afford: A place which is not prison but in which a person is "off the street" in every meaningful sense. Mr. Moody is now in about the middle of a five month training program and is a seven-day-a-week resident of the Youth With a Mission Training School in southern California.

He sees a psychiatrist acceptable to me once a week and, although it would be improper for me publicly to discuss feedback I get from the doctor, I have no present reason to be uncomfortable about progress.

When Mr. Moody finishes his training program, he will go, at his own expense, to the Hong Kong area and work in a camp for Vietnamese "boat people" for a minimum of two years. I defined the requirement from the bench as "two years of blood, sweat and darned hard work" and specified that, if he wwants to preach the the gospel on top of that, he may. The head of the missionary program assured me in open court that the organization would agree to such a condition.

No one sentencing felons, even those in the odd circumstance of this case, has any business assuming that everything will be o.k. It's often not. We take a responsibility for risk of danger to the public every time we assess one minute less than a maximum sentence. Mr. Moody presents risks. While we all <u>hope</u> his behavior was situationally limited, he has deliberately killed a fellow human being with a shotgun and must, accordingly, be watched carefully.

The greater risk, it seems to me, is that he will be perceived as being "forgiven" for shooting someone and that this very much publicized case will have some sort of reverse-deterrent effect on other troubled young people - some sort of notion that it's o.k. to kill if a person's really bad. That scares me a lot, but once the District Attorney made the perfectly just decision to not try this young man for First Degree Murder, we had jointly embarked on a course of trying to do some sort of

justice in a very unusual case even while risking the deterrent impact issue we normally find so important.

In closing, a word on the public's reaction seems indicated: Due to a mistake in one press account, which got picked up in a wire service story, the public was led to believe that I was seeking suggestions on how to sentence Mr. Moody. While that was an error, it's been very interesting to see what people have to say.

I have received about 2,500 letters from all over the country, Canada and the Carribbean. In what we probably all would agree to be a period of concern for violent crime and attendant demand for "stiff sentences," I can tell the subcommittee that well over 99% of the people who have written me have either endorsed the idea of the sentence which was imposed or something less punitive - probably 40% advocated letting him go unsanctioned altogether, never an alternative which crossed my mind.

One may quite properly ask what Senate hearings on Juvenile Jutice have to do with this bizzarre case - given that its combination of events make it so unique. I posed this question to the staff myself when first contacted to give this testimony.

There may, however, be an answer, and I would try phrasing it something like this: All the evidence says family sexual abuse and violence are common and that they perpetuate themselves over generations in thousands of settings which never make the headlines. As publicity is given to the acts of young people who "fight back" by taking revenge on parents - something over which the Congress and Courts have little control - we must assume that this type of violence will increase unless the cycle can be broken. While the Moody case differs from others in dimensions which attract the media, in most which are important to you or to me, it remains a "textbook" case.

I would be honored to answer any questions you may have.

Senator SPECTER. I would like to call now on Deputy District Attorney Kenneth Kobrin, who has a distinguished professional career, having graduated from the McGeorge School of Law, University of the Pacific, with a juris doctor, in 1977. He has been deputy district attorney of Solano County for some 6 years, with a wide range of important duties there.

We are pleased that you could join us, Deputy District Attorney Kobrin, to tell us about the case involving the 12-year-old, Amy, and how you handled it.

STATEMENT OF KENNETH KOBRIN

Mr. KOBRIN. Thank you, Mr. Chairman.

During the first few months of 1983, Amy, a 12-year-old girl, was molested on approximately five to seven occasions by her stepfather, then U.S. Air Force physician Kent David Tonnemacher. Not allegedly molested—molested, for Dr. Tonnemacher admitted in a signed statement to Vacaville police officer Pauline Hughes conduct by himself that amounted to a violation of penal code section 288(a) of the California code, which is lewd or lascivious acts upon or with the body of a child under the age of 14 years—a felony punishable by 3, 6, or 8 years in prison.

The Vacaville Police Department forwarded a copy of its investigation of the matter to the office of the district attorney of Solano County and requested that criminal charges be filed. That investigation was reviewed by District Attorney Mike Nail, who concurred with the police department's assessment and directed the issuance of a felony criminal complaint.

On September 16, 1983, the complaint against Dr. Tonnemacher was dismissed by the court after it granted a motion to quash the subpoena directing Amy's appearance at the preliminary hearing set for that day. Prior to the dismissal, Dr. Tonnemacher rejected an offer of a negotiated plea to a misdemeanor violation of section 647(a) of the California Penal Code—annoying or molesting a child under the age of 18 years. This offer of a negotiated plea was made by the district attorney's office to avoid the necessity of calling Amy to testify against her will.

California law permits the refiling of a felony complaint one time after a dismissal. Discussions were held within the office of the district attorney concerning the refiling of charges. Due to the fact that the defendant was a physician and as such held a position of trust and had occasion to give intimate examinations to female patients, it was decided that the defendant must be monitored by the court and probation department. Chief Deputy District Attorney Michael Smith directed that the case be refiled.

On December 30, 1983, the preliminary hearing was commenced on the refiled charge. Amy, accompanied by an attorney retained by her mother——

Senator SPECTER. Why was the decision made to be refiled? Or, let me make it more pointed. Was there any conduct on the part of the defendant which led to the refiling of the complaint?

Mr. KOBRIN. We were aware that the defendant was examining victims of sexual assault in the interim, as well, and we had concerns about that, in addition.

Senator SPECTER. That was the only thing?

Mr. KOBRIN. That was not the only thing, no. We felt that under the circumstances, we had to have some monitoring of this conduct to ensure that he did not reoffend.

Senator SPECTER. But I was asking about whether any specific conduct occurred on his part.

Mr. KOBRIN. On his part, no.

Senator SPECTER. OK. Proceed, please.

Mr. KOBRIN. OK. Amy was called to the witness stand and refused to take the oath and was found in civil contempt of court by Judge John DeRonde pursuant to section 1219 of the California Code of Civil Procedure. Section 1219 empowers the court to hold in confinement any person who refuses to obey a lawful order of the court and who has the ability to obey that order until such time as the order is complied with, or until it becomes apparent that further incarceration will not compel compliance with the court's order.

After evaluating the limited options available, Amy was taken into custody and held at the Solano County Juvenile Hall, which is the only secure detention facility for juveniles in the county. Meetings with Amy in advance of the hearing date were not held, due both to her having moved outside the county and her attorney's request.

On January 2, 1984, JoAnn McLevis, the victim-witness coordinator for the district attorney's office Victim-Witness Assistance program, met with Amy at Juvenile Hall. During Ms. McLevis' conversation with Amy, Amy confirmed the belief of the district attorney's office that her refusal to take the oath and testify was due to improper conduct by Amy's mother, and Amy's belief that her mother would be angry with her if she told the truth.

Although Amy had already told Officer Hughes what her stepfather had done to her, her out-of-court statement constituted hearsay and was not admissible in court. Not one of the numerous exceptions to the hearsay rule applied to the situation. While the defendant's statement to Officer Hughes did fall within the admission exception to the hearsay rule, California law does not permit the use of a criminal defendant's admission or confession unless the prosecution can first establish the corpus of the crime with independent admissible evidence. In the case of the *People of the State of California* v. *Kent David Tonnemacher*, the only independent admissible evidence of the offense so as to permit the introduction of the defendant's confession was the direct testimony of Amy herself.

During the following week, Amy was called to the witness stand each court day. Each day, Amy, in the accompaniment of an attorney, refused to take the oath and testify. Each day, Amy was again found in civil contempt of court and remanded to custody.

Amy's situation, the propriety of her continued incarceration, and the propriety of continued prosecution of the case against her stepfather were evaluated and reevaluated daily, by District Attorney Mike Nail, Chief Deputy District Attorneys Michael Smith and David Paulson, JoAnn McLevis, myself and others in the office.

Senator SPECTER. And I take it you thought at some point she might testify.

Mr. KOBRIN. Yes, and as I——

Senator SPECTER. That is pretty tough treatment for a 12-year-old girl, though.

Mr. KOBRIN. The situation was not as the press made it out to be.

Senator SPECTER. Why not?

Mr. KOBRIN. OK. We considered views of others in addition to our own Solano County Probation Department, Solano County Welfare Department; the press and public's opinions were even considered. Each time, though, the consensus within the district attorney's office was the same.

Senator SPECTER. How did you consider the opinion of the public?

Mr. KOBRIN. We discussed the public outcry about it and the views that it was improper. We felt, however, that the public was not aware of the total situation——

Senator SPECTER. What right did the press have to be consulted?

Mr. KOBRIN. We were not consulting them.

Senator SPECTER. You mean, you considered their comments.

Mr. KOBRIN. We considered their comments, certainly.

Senator SPECTER. You could not bring the case strictly on the confession. You had to have the testimony of the young woman?

Mr. KOBRIN. It was absolutely impossible to put the confession into evidence without the corpus, and the only evidence of that corpus was her statement, period. Without her testimony, there was no case, there was no prosecution.

It was our opinion—which was confirmed by Amy's statements—that her refusal to testify was because of pressure from her mother—not, as her attorneys were saying, that she did not want to break up the family. Amy has indicated at one time or another to JoAnn McLevis that she hated her stepfather, that she was afraid her mother would be angry with her if she testified. She was told by her mother that if she did testify, they would lose her home, that they would have to move to Fresno, which Amy did not want to do; she hated living in Fresno. She was told that once this was all over, if she did not testify, she would get a new brass bed that she had always wanted, and she would get new wallpaper——

Senator SPECTER. How did she respond to the jailing? I mean, what you were really on was a tug-of-war between the forces keeping Amy away from testify, contrasted with the pressure of being in jail.

Mr. KOBRIN. Amy's conditions in Juvenile Hall were not harsh at all. She had a color television set, a radio, candy, magazines. She had visitors; she had pretty much free run of the place when the delinquent population was locked up.

Senator SPECTER. Did you consider having it not quite so pleasant, as a method of putting more pressure on her?

Mr. KOBRIN. We did not consider that, really, within the province of the district attorney's office. The Juvenile Hall is run by the probation department, under California law, and we did not deem it our——.

Senator SPECTER. Well, you could make a suggestion to the court about a sanction.

Mr. KOBRIN. We could, but we did not.

Senator SPECTER. I take it it was a fairly uncomfortable situation for you as you evaluated it day by day. Did you spend a lot of time on it?

Mr. KOBRIN. It was uncomfortable being the focus of so much controversy. However, we were confident that we were doing the only proper thing under the circumstances. The press and the public were not aware of everything that we were, and it would have been improper for us to have commented on the true facts of the situation.

Senator SPECTER. What was the key factor which led you to finally discontinue the incarceration?

Mr. KOBRIN. Well, we had been told by Amy on two to three occasions that she would testify. In fact, the Friday before the matter was dismissed, she had indicated she would testify on the following Monday. She wanted to wait the weekend to see what else she could get from her mother besides the brass bed and so on, if she did not testify until then. Amy was, in fact, apparently, using the situation to get things from her mother.

Senator SPECTER. Did her mother up the ante over the weekend?

Mr. KOBRIN. I do not know. At that point, her mother was not having direct contact with Amy. That had been prohibited by the court when it became apparent that——.

Senator SPECTER. So how was Amy negotiating with her mother?

Mr. KOBRIN. I do not know at this point.

To ensure the protection of Amy in the future and prevent as much as possible the sexual victimization of others in the future, we thought it was necessary that the defendant be under the supervision of the court and probation department, and the only way to obtain that and guarantee that he could not unilaterally terminate the supervision and the psychological counseling that would accompany it was through a criminal conviction. The only way to obtain that was if Amy testified.

We were aware of Amy's conditions in the hall, as I have just indicated. She had a room of her own. In fact, later on when she was sent to a foster home at the order of Judge Harris, she indicated she did not like it at the foster home, that she wanted to be back at Juvenile Hall. She liked it at Juvenile Hall. She had her own room there, and did not like being with eight or nine other children, as she was at the foster home.

Also, her mental and physical state were evaluated frequently by probation department personnel, social workers, and JoAnn McLevis of our office.

On several occasions during the pendency of the proceedings, our office received word from Amy that she wanted to testify.

On January 4, 1984, the probation department advised us that Amy had indicated she would testify on the following day. She did not.

On January 6, Amy told JoAnn McLevis she would testify if she could first meet with her mother, and her mother told her it was all right for her to testify. Amy's mother refused to talk with Amy unless she was first given immunity from prosecution. Amy's mother was granted immunity for past conduct in influencing Amy not to testify. Amy's mother refused, however, to tell Amy she should testify, but agreed to tell Amy she would love her whatever Amy decided to do. After their meeting, Amy's mother, through her own attorney, and Amy's attorneys, indicated they believed Amy would testify. When she took the witness stand, her attorney

requested a continuance until the following Monday, and the court granted that.

Meanwhile, the next day, Saturday, January 7, 1984, Amy's attorney made an ex parte request to Judge Richard Harris of the superior court that Amy be released to a foster home. Without attempting to notify or consult with the district attorney's office, Judge Harris granted the motion, ordered Amy's immediate release to a foster home, and set January 10, 1984, to hear the district attorney's position.

On Monday, January 9, 1984, Amy took the witness stand and once again, refused to take the oath and testify. The defendant was again offered a negotiated plea to a misdemeanor charge of annoying or molesting a child under the age of 18 years. He again refused.

Discussions within the office of the district attorney resulted in the determination by District Attorney Mike Nail that further incarceration of Amy would not induce her to change her mind and testify. As a result, the case against Dr. Tonnemacher was dismissed. District Attorney Mike Nail has proposed a change in the law in California, which is along the lines as you have discussed previously with other witnesses in this hearing—a new exception to the hearsay rule that would permit the reading into the record of a statement of a victim of child molest, or the playing of a videotape of that statement in court to establish the corpus delecti needed to permit the introduction of the defendant's admission or confession into evidence. Such a change in the law would balance the need of society to be protected from child molesters and the need to protect the victim's rights with the rights of those accused.

But the case of *People* v. *Tonnemacher*, has brought to light in the minds of many of those who know all the facts of the case, the need for other changes as well. The need for an evaluation of the ethics of a national press more interested in sensationalism than objective reporting of the facts. The need for the setting of guidelines for attorneys who represent victims, especially juvenile victims, who refuse to testify.

Should the attorney merely advise such a victim of his or her legal obligations and rights and the consequences of violating those obligations?

Should the attorney advise his client that, in the attorney's opinion, the client will not be held in custody much longer, thereby encouraging the client to continue with his or her course of conduct?

And should the superior court permit a mother who does not want her daughter to testify against her husband to hire an attorney for that daughter and order that the attorney be permitted to meet alone with the daughter despite the daughter's insistence that she does not want to meet alone with the attorney, let alone be represented by him?

Under California law, the charges against Dr. Tonnemacher cannot be refiled, even if Amy now changes her mind and decides to testify. The decision to prosecute Dr. Tonnemacher against the will of his victim was not an easy one. It was even harder to ask the court to hold Amy in contempt and incarcerate her. But under the existing laws and the facts of the case, they were the proper decision.

Senator SPECTER. Thank you very much, Deputy District Attorney Kobrin. That is very enlightening, and I very much appreciate your being here and giving us that full explanation and responding to the questions.

[The following was received for the record:]

PREPARED STATEMENT OF KENNETH KOBRIN

During the first few months of 1983, Amy, a twelve year old girl, was molested on approximately five to seven occasions by her stepfather, then United States Air Force physician Kent David Tonnemacher. Not allegedly molested—molested, for Dr. Tonnemacher admitted in a signed statement to Vacaville Police Officer Pauline Hughes conduct by himself that amounted to a violation of section 288(a) of the California Penal Code—lewd or lascivious acts upon or with the body of a child under the age of fourteen years—a felony punishable by three, six or eight years in prison. The Vacaville Police Department forwarded a copy of its investigation of the matter to the Office of the District Attorney of Solano County and requested that criminal charges be filed. That investigation was reviewed by District Attorney Mike Nail who concurred with the Police Department's assessment and directed the issuance of a felony criminal complaint.

On September 16, 1983, the complaint against Dr. Tonnemacher was dismissed by the court after it granted a motion to quash the subpoena directing Amy's appearance at the preliminary hearing set for that day. Prior to the dismissal, Dr. Tonnemacher rejected an offer of a negotiated plea to a misdemeanor violation of section 647a of the California Penal Code—annoying or molesting a child under the age of eighteen years. This offer of a negotiated plea was made by the District Attorney's office to avoid the necessity of calling Amy to testify against her will.

California law permits the refilling of a felony complaint one time after a dismissal. Discussions were held within the Office of the District Attorney concerning the refiling of charges. Due to the fact that the defendant was a physician and as such held a position of trust and had occasion to give intimate examinations to female patients, it was decided that the defendant must be monitored by the court and probation department. Chief Deputy District Attorney Michael Smith directed that the case be refiled.

On December 30, 1983, the preliminary hearing was commenced on the refiled charge. Amy, accompained by the attorney retained for her by her mother, was called to the witness stand. She refused to take the oath and was found in civil contemp of court by Judge John DeRonde pursuant to section 1219 of the California Code of Civil Procedure. Section 1219 empowers the court to hold in confinement any person who refuses to obey a lawful order of the court—and who has the ability to obey the order—until such time as the order is complied with or until it becomes apparent that further incarceration will not compel compliance with the court's lawful order.

After evaluating the limited options available, Amy was taken into custody and held at the Solano County Juvenile Hall—the only secure detention facility for juveniles in the county. Meeting with Amy in advance of the hearing date were not held due both to her having moved outside of the county and her attorney's request.

On January 2, 1984, Jo Ann McLevis, Victim-Witness Coordinator for the District Attorney's Victim-Witness Assistance Program, met with Amy at Juvenile Hall. During Ms. McLevis' conversation with Amy, Amy confirmed the belief of the District Attorney's office that her refusal to take the oath and testify was due to improper conduct by Amy's mother and Amy's belief that her mother would be angry with her if she told the truth.

Although Amy had already told Officer Hughes what her stepfather had done to her, her out of court statement constituted hearsay and was not admissible in court. Not one of the numerous exceptions to the hearsay rule applied to the situation. While the defendant's statement to Officer Hughes did fall within the admission exception to the hearsay rule, California law does not permit the use of a criminal defendant's admission or confession unless the prosecution first establishes the corpus of the crime with independent admissible evidence. In the case of The People of the State of California vs. Kent David Tonnemacher, the *only* independent admissible evidence of the offense so as to permit the introduction of the defendant's confession was the direct testimony of Amy herself.

During the following week, Amy was called to the witness stand each court day. Each day, Amy, in the accompaniment of an attorney, refused to take the oath and

testify. Each day, Amy was again found in civil contempt of court and remanded to custody.

Amy's situation, the propriety of her continued incarceration and the propriety of continued prosecution of the case against her stepfather were evaluated and re-evaluated daily by District Attorney Mike Nail, Chief Deputy District Attorneys Michael Smith and David Paulson, Jo Ann McLevis, myself and others in the office. The views of others, including the Solano County Probation Department, the Solano County Welfare Department, the press and public were heard and considered. Each time, the consensus in the District Attorney's office was the same. Amy was refusing to testify because of pressure from her mother. To ensure the protection of Amy in the future and prevent as much as possible the sexual victimization of others in the future, it was necessary that the defendant be under the supervision of the court and probation department. The only way to obtain such supervision and guarantee that the defendant could not unilaterally terminate such supervision and the psychological counseling that would accompany it was through a criminal conviction. The only way to obtain a criminal conviction, absent a guilty plea by the defendant, was if Amy testified.

The District Attorney's office was aware of the conditions of Amy's incarceration. Amy's condition and state of mind were monitored and assessed frequently by the probation department, social workers and the victim-witness coordinator. She was held in a room—cell if you so choose to call it—of her own. In accordance with the law, her door was locked while the delinquent population of juvenile hall was out and about, in order to keep her separate from juveniles being detained for criminal conduct. When the delinquent population was not out, Amy's door was not locked and she frequently roamed the visiting room and other open areas. She had visitors—juvenile hall staff, her attorneys, social workers, and the victim-witness coordinator from the District Attorney's office. Her visits were unmonitored and unrestricted unlike the usual visiting time rules, although her mother's visitation rights were suspended when it became apparent she was improperly influencing Amy's decision. Amy was permitted a color television, a radio, and candy in her room and was brought food from area restaurants when she indicated she did not like the food normally served in juvenile hall. Her conditions were not cruel, they were not harsh.

On several occasions during the pendency of the proceedings, the District Attorney's office received word from Amy that she wanted to testify. On January 4, 1984, the probation department advised that Amy had indicated she would testify on the following day. She did not. On January 6, Amy told Jo Ann McLevis she would testify if she could meet with her mother and her mother told her it was alright for her to testify. Amy's mother refused to talk with Amy unless she was first given immunity from prosecution. Amy's mother was granted immunity for past conduct in influencing Amy not to testify. Amy's mother refused to tell Amy she should testify but agreed to tell Amy she would love her whatever Amy decided to do. After their meeting, Amy's mother, through her own attorney, and Amy's attorneys indicated they believed Amy would testify. When she took the witness stand, her attorney requested a continuance until the following Monday. The court granted the motion.

On Saturday, January 7, 1984, Amy's attorney made an ex parte request to Judge Richard Harris of the Superior Court that Amy be released to a foster home. Without attempting to notify or consult with the District Attorney's office, Judge Harris granted the motion, ordered Amy's immediate release to a foster home and set January 10, 1984 to hear the District Attorney's position.

On Monday, January 9, 1984, Amy took the witness stand and, once again, refused to take the oath and testify. The defendant was again offered a negotiated plea to a misdemeanor charge of annoying or molesting a child under the age of eighteen years. The defendant again refused.

Discussions within the office of the district attorney resulted in a determination by District Attorney Mike Nail that further incarceration of Amy would not induce her to change her mind and testify. As a result, the District Attorney's office moved to dismiss charges against Dr. Tonnemacher. Judge DeRonde indicated that the court had independently reached the same conclusion and granted the motion to dismiss.

District Attorney Mike Nail has proposed a change in the law in California—a new exception to the hearsay rule that would permit the reading into the record of the statement of a victim of child molest or the playing of a videotape of that statement in court to establish the corpus delecti needed to permit the introduction of the defendant's admission or confession into evidence. Such a change of law would

balance the need of society to be protected from child molesters and the need to protect the victim's rights with the rights of those accused of criminal conduct.

But the case of People vs. Tonnemacher has brought to light in the minds of many who know all the facts of the case the need for other changes as well. The need for an evaluation of the ethics of a national press more interested in sensationalism than objective reporting of the facts. The need for the setting of guidelines for attorneys who represent victims—especially juvenile victims—of crime who refuse to testify. Should the attorney merely advise such a victim of his or her legal obligations and rights and the consequences of violating those obligations? Should the attorney advise his client that, in the attorney's opinion the client will not be held in custody much longer, thereby encouraging the client to continue with his or her course of conduct? And should the Superior Court permit a mother who does not want her daughter to testify against her husband to hire an attorney for that daughter and order that the attorney be permitted to meet alone with the daughter despite the daughter's insistence that she does not want to meet alone with the attorney, let alone be represented by him?

Under California law, the charges against Dr. Tonnemacher cannot be refiled, even if Amy now change her mind and decides to testify.

The decision to prosecute Dr. Tonnemacher against the will of his victim was not an easy one. The decision to ask the court to hold Army in contempt and incarcerate her was even more difficult. But under the existing laws and the facts of the case, they were the proper decisions.

R. MICHAEL SMITH
CHIEF DEPUTY D.A.

MIKE NAIL
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January 9, 1984

PRESS RELEASE

The Office of the District Attorney of Solano County is charged with enforcing the laws of the State of California. We do not make those laws. When the abuse of a child, be it sexual or otherwise, comes to the attention of a child care custodian, medical or nonmedical practitioner or employee of a child protection agency, within the scope of his or her employment, that person must notify the appropriate law enforcement agency, probation department or welfare department (Penal Code 11166). An investigation is then conducted and the results forwarded to the District Attorney's Office if a violation of law appears to have occurred.

That procedure was followed in the case of People vs. Kent David Tonnemacher. Based on the evidence, which included a confession by Dr. Tonnemacher to Officer Hughes of the Vacaville Police Department, this office filed a felony charge alleging a violation of California Penal Code Section 288(a).

Before a confession can be introduced into evidence, California law requires an independent showing by admissible evidence that a violation of the statute occurred. The only independent admissible evidence of the violation in the case of Dr. Tonnemacher was the testimony of his step-daughter.

The victim refused to obey a lawful Order of the Court that she take the oath and testify. As a result of her refusal to obey the law, the victim was found in civil contempt (Code of Civil Procedure 1219) and placed in custody. She was in custody not because she was the victim, but because she disobeyed the law. This office did not want her in custody, we were concerned about her welfare. But this was the only remedy the law provided. Without her testimony, a child molester would be able to continue to give intimate examinations to other female minors. Although we are aware of no impropriety, this office is aware of at least two incidents, one of which occurred after the original filing of this case, in which Dr. Tonnemacher examined female minor victims of sexual abuse.

When the news media became interested in the case, they picked up on defense terminology and, without independent investi-

gation, adopted terminology utilized by the defense that was meant to inflame the public.

The press has utilized the term solitary confinement. Amy was held in Juvenile Hall in a room of her own. The door was locked during the day while the delinquent population of the Hall were out. When the delinquent population was returned to a locked status, her door was left unlocked. In her room, Amy had a color television and a radio. She was visited by Children's Protective Services and a social worker. She did not like the food served at Juvenile Hall so food was brought to her from Fairfield restaurants. Since she was taken to a foster home on Saturday, Amy has stated she preferred her conditions at Juvenile Hall over those of the foster home!

The history of this case is frought with attempts to prevent a hearing on the merits. When the case was first filed, Mrs. Tonnemacher hired an attorney to challenge the service of subpoena on Amy. The motion to quash the subpoena was granted and resulted in a dismissal of the case. Under California law, a felony case can be dismissed twice before further prosecution is barred. The matter was refiled and Amy was served with a subpoena to be present at the arraignment. Defense attorney, Gary Ichikawa, learned of the refiling and, without notice to this office that he was asking for an acceleration of the arraignment date, went before a visiting judge who arraigned Dr. Tonnemacher and set a preliminary hearing only five court days later, well in advance of the date Amy was to appear.

The Office of the District Attorney shared the concern and outrage over the situation. But it was a situation created by Amy's parents - the step-father who molested her, the mother who pressured Amy not to testify. It was not until Friday that her mother, Lupe Tonnemacher, was willing to do anything to end the stalemate that was created by her own pressures which had convinced Amy not to testify. At that time, Mrs. Tonnemacher agreed to talk to Amy, but only to the extent that she would tell Amy she loved her no matter what happened. She agreed to do this only after the Office of the District Attorney agreed not to prosecute her for any past conduct that might have persuaded Amy not to testify.

As of last Friday, we believed Amy would testify today. Her mother conveyed to us, through an attorney, that she also believed Amy would testify today.

Unfortunately, Amy has not testified.

The Office of the District Attorney is convinced that further incarceration will not induce Amy to testify. We are unable to proceed without her testimony. We offered the defendant a misdemeanor plea which he rejected.

We therefore had no alternative but to dismiss the charge.

PRESS RELEASE

BECAUSE OF WIDESPREAD MEDIA ATTENTION AND COMMENTS BY THOSE WHO HAVE DISTORTED, OR, AT THE VERY LEAST, HAVE ATTEMPTED TO SHIFT THE FOCUS OF THIS CASE AWAY FROM THE SEARCH FOR THE TRUTH, THIS COURT FEELS COMPELLED TO STATE THE FACTS OF THIS CASE FOR THE PUBLIC BENEFIT.

THIS IS A FELONY CHILD MOLESTATION CASE THAT THE SOLANO COUNTY DISTRICT ATTORNEY'S OFFICE ELECTED TO PROSECUTE. IT INVOLVES AN ACCUSED CHILD MOLESTER WHO HAS ADMITTED UNLAWFUL SEXUAL CONTACTS WITH HIS TWELVE-YEAR-OLD STEPDAUGHTER, WHO LATER PLEAD NOT GUILTY WHEN CHARGED WITH THE CRIMINAL ACT.

AS A RESULT OF THIS NOT GUILTY PLEA, THE DISTRICT ATTORNEY'S OFFICE WAS COMPELLED TO CALL THE VICTIM OF THE SEXUAL OFFENSE TO PROVE THEIR CASE,FOR THE LAW DOES NOT DEEM A CONFESSION SUFFICIENT TO CONVICT A PERSON OF ANY CRIME WITHOUT SUFFICIENT INDEPENDENT EVIDENCE AS TO THE OCCURRENCE OF THE CRIME.

THE VICTIM'S MOTHER WAS SUBPOENAED TO APPEAR AT THE FIRST SCHEDULED COURT HEARING AND WAS GIVEN A SUBPOENA AND DIRECTIVE TO BRING HER DAUGHTER AS WELL. SHE FAILED TO BRING HER DAUGHTER AS REQUESTED AND THE PROCEEDINGS WERE DISMISSED.

THE PROCEEDINGS WERE REINSTATED AFTER THE DISTRICT ATTORNEY FILED A SECOND COMPLAINT AND THE CHILD APPEARED AT THE HEARING THIS TIME WITH AN ATTORNEY, HIRED BY THE MOTHER. WITH THE ATTORNEY AND HER MOTHER PRESENT, THE

VICTIM REFUSED TO TAKE THE OATH AND TELL THE TRUTH ABOUT WHAT HER STEPFATHER HAD DONE TO HER.

THIS JUDGE WAS THEN PLACED INTO A POSITION OF DISMISSING THE CHARGES AND ALLOWING THE DEFENDANT TO GO FREE OR TRYING TO REMOVE THE CHILD FROM THE INFLUENCE OF TREMENDOUS PSYCHOLOGICAL PRESSURE THAT WAS CAUSING HER TO REFUSE TO TESTIFY.

NO ONE REGRETTED MORE THAN I THE INVOCATION OF THE COURT'S POWERS OF CONTEMPT. THROUGHOUT THE COURSE OF THESE PROCEEDINGS, THIS JUDGE MADE NUMEROUS INQUIRIES INTO THE CHILD'S EMOTIONAL AND PHYSICAL WELL BEING. INDEED, I INVITED AND SOLICITED THE AID OF OUR VICTIM/WITNESS PROTECTION PERSONNEL AND CHILD PROTECTIVE SERVICES TO PROVIDE COUNSELING AID TO THE VICTIM AND TO SUGGEST TO THE COURT ALTERNATIVE PLACEMENT FACILITIES.

AFTER HAVING BEEN INTERVIEWED AND COUNSELED BY THE VICTIM/WITNESS PROTECTION PERSONNEL AND HAVING REMAINED FREE OF THE INFLUENCE OF THE DEFENDANT'S WIFE FOR A SHORT PERIOD OF TIME, IT WAS REPORTED TO THIS COURT LAST FRIDAY MORNING THAT THE VICTIM WAS GOING TO TELL THE TRUTH ABOUT HER STEPFATHER'S SEXUALLY FONDLING HER. JUST BEFORE GIVING HER TESTIMONY, THIS COURT WAS SERVED WITH AN ORDER FROM JUDGE RICHARD M. HARRIS WHICH REQUIRED THAT A NEW ATTORNEY, AGAIN HIRED BY THE ACCUSED'S WIFE, BE ORDERED TO TALK IN PRIVATE WITH THE GIRL. ALTHOUGH THE VICTIM EXPRESSED A DESIRE NOT TO SPEAK TO THE NEW ATTORNEY, THIS COURT HAD NO OPTION BUT TO FOLLOW THE ORDER OF JUDGE HARRIS FORCING THE INTERVIEW. THE DISTRICT ATTORNEY AND THE VICTIM/WITNESS PROTECTION PERSONNEL WERE NOT ALLOWED TO BE PRESENT AS A NATURAL RESULT OF JUDGE HARRIS' ORDER.

AFTER THE INTERVIEW, THE VICTIM WAS TOO DISTRAUGHT TO TESTIFY.

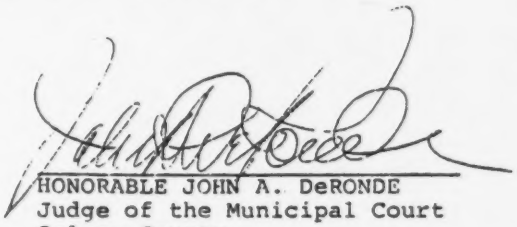
ON SATURDAY, JANUARY 7, 1984, THE ATTORNEY HIRED BY THE DEFENDANT'S WIFE APPROACHED JUDGE HARRIS WITHOUT NOTIFYING THE DISTRICT ATTORNEY'S OFFICE AND OBTAINED AN ORDER RELEASING THE YOUNG GIRL, AN ACT WHICH EFFECTIVELY ELIMINATED THIS COURT'S CIVIL CONTEMPT POWER AND ABILITY TO PROCEED ANY FURTHER WITH THE HEARING AGAINST THE DEFENDANT. AS A RESULT, THE PROCEEDINGS WERE DISMISSED.

THE EFFECT OF THIS DISMISSAL IS AN ABROGATION OF JUSTICE AND DENIES THE STATE AN OPPORTUNITY TO PROVE ITS CASE. THE UNFORTUNATE PLIGHT OF THE VICTIM IN THE SHORT RUN HAS OVER-SHADOWED AND COMPLETELY ECLIPSED HER TRAVAIL IN THE FUTURE.

THE DEFENDANT'S VOLUNTARILY CONFESSING HIS CRIMES AND SEEKING OUT COUNSELING IS LAUDABLE, BUT IT DOES NOT DECLARE HIM INNOCENT BEFORE THE COURT. AS A RESULT OF THE PROCEEDINGS BEING DISMISSED, HOWEVER, NO COURT WILL HAVE ANY INFLUENCE OVER THE DEFENDANT'S BEHAVIOR IN THE FUTURE WHETHER HE ELECTS TO CONTINUE COUNSELING OR NOT.

PERHAPS THE MOST UNFORTUNATE RESULT OF THE CASE IN THE LONG RUN IS THAT THE DISMISSAL, MADE INEVITABLE BY JUDGE HARRIS' ORDER, SERVES AS A STATEMENT TO OTHERS, BOTH DEFENSE ATTORNEYS AND THOSE ACCUSED OF SIMILAR SEXUAL CRIMES AGAINST MINORS, THAT WITNESS INTIMIDATION AND COERCION WILL NOT BE PUNISHED BUT INSTEAD BE REWARDED BY A DISMISSAL OF CHARGES. THAT LEAVES BUT ONE RESULT, THAT THE ADMITTED CHILD MOLESTER IS SET FREE, WITHOUT PUNISHMENT OR CONTROLS, INTO THE COMMUNITY.

IN CONCLUSION, I FOLLOWED THE LAW AND DID WHAT THE LAW REQUIRED ONLY TO BE CASTIGATED IN THE PRESS. AS A CONSEQUENCE A GUILTY PERSON GOES FREE, THE CHILD'S ANGUISH PERSISTS, FUTURE TRANSGRESSIONS MAY DEVELOP AND THE SYSTEM NOW HAS BEEN MODIFIED TO SANCTION WITNESS INTIMIDATION BY THOSE THAT CAN AFFORD TO EMPLOY SUCH TACTICS.



HONORABLE JOHN A. DeRONDE
Judge of the Municipal Court
Solano County

DATED: January 9, 1984

MIKE NAIL
District Attorney

R. MICHAEL SMITH
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January 18, 1984

INFORMATIONAL MEMORANDUM

In the interest of preserving the context of my conversations with victim AMY MILLAR, I have prepared and attached a detailed record regarding those contacts.

Jo Ann McLevis, Program Coordinator
Victim-Witness Assistance Program
District Attorney's Office

My first visit with Amy was at Juvenile Hall on Monday, January 2, 1984, three days after she was remanded into custody for refusing to take the oath. The visit lasted for approximately 1½ hours from 5 - 6:30 pm. When I first arrived, Amy acknowledged my presence but seemed indifferent and distant to me. While Amy layed facing the wall, I told her who I was and what my role was in her case, and that she had a right to talk or to not talk with me. Although Amy agreed to talk with me, she was quiet and reclusive for the first 10-15 minutes and remained facing the wall.

I told Amy that I believed her story and that I have worked with hundreds of kids who have been sexually abused and that I know that she probably felt very alone, but there are thousands of kids who have been sexually abused. I told her that studies show that less than 2% of reports like this are kids lying . . . . that I know how embarrassing this must be and I wanted to help her if I could, but that I needed her help to do that. I told her that I was not here to convince her she should testify that that choice and consequence was hers. My job was to keep her informed and help her if I could.

She rolled over and sat up in her bed and <u>really</u> looked at me for the first time. I asked her what she believed would happen if she testified. She responded that Kent would get in a lot of serious trouble and probably lose his job and that her mother would be very mad with her. I asked her what made her think that. She said her mother did - - that she (the mother) had told her (Amy) that if she testified Kent would go to jail and lose his job and they would lose their home and have to sell their furniture and move to Fresno. Amy said she hated living in Fresno where she has been in CPS placement with her maternal grandparents, and she wanted to return to her home in Vacaville. I asked Amy how she felt about her stepfather. She stated that she hated him and always had. She thought he was weird and was upset when her mother married him. She stated she even hated him more for what he had done to her. I then asked her why then was she trying to protect him - - didn't she think he was wrong in what he had done and would she want him to do that to her again or to her girlfriend? She became irritated and responded she was not protecting him that she knew it was wrong and she wanted him to be punished for what he had done, but her mother would not ever let her come home if she testified against him because she (Amy) knew that her mother would try to reconcile with him. I asked Amy if she wasn't concerned about the defendant returning home and molesting her again. She said no because her mom had promised her that it would never happen again. I informed Amy of organizations who are there to help her. We talked about Rape Crisis, Mental Health, Childrens' Home Society, Victim Outreach, and Parents/Daughters & Sons United. Amy said she had been involved in DSU and didn't like it and didn't feel she fit in these because she never saw the defendant as a father figure due to her dislike of him. I asked Amy if she wanted me to call anyone for her. She said no that her attorney told her she would be going home soon and that she expected it would soon be over with. I gave her my business card and added my home phone to it for

her to call me if she wanted to talk about anything.

When I asked her to rate her relationship with her mom on a scale of 1-10, she responded that before she came to Juvenile Hall it was a 2 but since she came to Juvenile Hall it was a 9. She attributed the improvement to all the gifts her mom was bringing her while she was there.

On Tuesday, January 3, 1984, I was approached by Tony Finkas about the purpose of my visit with Amy the preceeding evening. I informed him of my function as Victim-Witness Coordinator and that I was not attempting to influence her one way or the other. The primary purpose of the visit was for emotional support and to inform her of other victim service agencies should she desire their support or assistance. Mr. Finkas said while he could appreciate the value of the assistance I offered to Amy, he preferred that I not contact her again and that he had advised Amy in that regard. He inquired as to whether Ken Kobrin had knowledge of my visit with Amy prior to the visit. I told him that he did not; however, I had called him after the visit. Mr. Finkas made reference to the visit as a possible impropriety. Approximately 20 minutes after this conversation, Mr. Finkas approached me again to apologize for the manner in which he handled our earlier contact.

On Thursday, January 5th, at approximately 10 am, the case was recessed for one hour and I was instructed by the Judge on the record to meet with Amy. Through her counsel, Irv Grant, County Counsel, I was told Amy would not see me; however, she would meet with Jerry Collins from Probation Juvenile Division. Amy again communicated through Jerry she would not see me. Jerry did get her to agree to meet with Margie Glideon from the Probation Department who is an incest victim herself. After Margie met with her, Amy told Jerry she did not like Margie and would not see her again. Margie told me their visit was somewhat intense and that

Margie had shared her own experience with Amy and Amy became quite emotional.

I communicated in writing to the Judge while on the bench that Amy still refused to see me and that I felt my benefit had been poisoned by the defense. I was instructed to continue to try to meet with her. Finally, shortly before 11 am, I was requested to accompany Ken Kobrin while he spoke with Amy. Irv Grant was present. Amy was withdrawn and uncommunicative. Ken told her that she did not have to talk with us, but it was important to him that she hear from him what his role and obligations are and that he was trying to do what was best for everyone . . . her and other little girls as well, and that it was painful for him to have to keep her in Juvenile Hall and he did not want to but didn't see where he had a choice. This meeting lasted 6 to 7 minutes.

When called to the stand, Amy again refused to take the oath and was remanded to Juvenile Hall.

At approximately 11:50, Ken Kobrin told me that Judge DeRonde had called and he wanted to see me in him chambers right away. I met him on his way out. We returned to his chambers and the Judge discussed with me, off the record, his grave concern for Amy and what she was going through. He said he was very impressed with the rapport he had witnessed me establish with victims and he felt Amy could benefit in having someone she could relate with in this time of despair for her. He said it was most critical that I make contact with her and open the lines of communication so that he would be assured that she fully understood her legal obligation to take the oath and to see if there was a resolvable conclusion in this case. We discussed my conversation with Mr. Finkas and my feelings that Amy had now been prejudiced that my visits were punitive for her. The Judge felt that given time I could reach her and she would sense the sincerity and concern we all felt for her circumstance, and she would at least give us a valid indication of her position. I was told by the

Judge to visit Amy that evening in Juvenile Hall and that I wasn't to take any "garbage" from anyone trying to stop me - - that if I encountered any interference I was to refer whomever directly to him. I was to report back to the Judge the next morning.

That evening I visited Amy at Juvenile Hall for approximately three hours, 8 - 11 pm. I was surprised to find that she seemed quite glad to see me. Again I told Amy that she did not have to talk to me, but that I was there on behalf of the Judge and that he was very concerned about her and that he wanted me to see if the reason that she refused to take the oath was something we could work out. Again, I asked her to explain to me why she didn't want to testify. Amy responded that she had already told me that it wasn't that she didn't want to testify but that she couldn't because her mom would be angry with her. I asked her why she thought that and she said her mom had told her about all the terrible things that would happen if she testified . . . . .Kent going to jail, loosing the house, furniture and moving to Fresno. Amy said she hates Fresno and that she lives there now with her maternal grandparents, who she dislikes and thinks they are stupid. She says, "They are on to her" and she can't do anything there and they make her go to church.

She stated she wanted to return to her mom in Vacaville because she can do whatever she wants to there that she knows exactly how to get her way when she really wants it. When asked what she meant she stated, "I can be a real little witch sometimes and I know exactly how to blackmail my mom." When I asked her if there was anything to be gained in what she was doing now she said, "Well, when I go home I'm getting a new wood bedroom set, a brass bed I've always wanted, and my mom has already picked out my new wallpaper from my room." Then she proudly displayed the new Sony Walkman T.V. her mom had bought and delivered to Juvenile Hall along with several boxes of chocolates and other candies, and a selection of magazines. I asked her other than the materialistic gain,

what else did she think would happen when she went home? Had she thought about what would happen when Kent came home? Did she think he would try to molest her again and what would she do if he did? She said she wasn't worried, because her mom said they (Mom & Kent) would just see one another and he wouldn't move back in. I asked for how long did she think her mom and Kent would be happy and content with that arrangement . . . the expense of two households and that I felt he would return to the home. She said he was getting counselling anyway. I told her it is rare that an offender who voluntarily initiates counselling will complete it because of the intensity of the therapy. I told her the only way Kent would continue with therapy would be if the Court ordered him to do so. She asked me if I could ask the Judge to do that. I explained that the Judge did not have the power to do that unless Kent either admitted his guilt or the D.A. convicted him in a trial. She replied that Kent had already admitted his guilt and I said only to the police, he would have to also admit it to the Judge, which he hasn't done - - that he had pled NOT GUILTY and that was why her testimony was so important - - that without it, in the eyes of the law, he goes free as though it never happened. She became angry and replied, "But he did it! He molested me; he can't get off completely can he?" I told her that he could if she didn't testify. I asked her what she wanted to happen. She said that she didn't want him to go to jail but that she wanted him to be punished for what he did. I told her she and her mom would have a right to have their feelings expressed to the Judge who would handle the sentencing and that I could not say that the Judge would not send him to jail, but Kent could apply for work furlough if he were sent to jail.

She told me if I could arrange a supervised visit with her mom and if her mom would assure her that she wouldn't get mad at her if she told the truth, then she would testify. Amy sked me what kinds of questions would they ask her about

what happened with Kent. We talked about that, and she expressed typical youthful embarrassment about saying "those words" and asked if she could refer to them as her "private spots". I told her she could. Amy told me the molests occurred about 5 - 7 times beginning in May/June. She had concerns about whether there would be other people in the courtroom - - especially her family. She wanted everyone out. She also wanted reassurance that I would be with her when she testified. I reassured I would support her whatever her decision. She asked if she could just let the Judge know tomorrow that she would testify, but she wanted to wait until Monday to testify. I asked her why would she want to do that - - if she testifies tomorrow she'll be released from Juvenile Hall. She said she knew that, but she wanted to stay there for the weekend to see what she might be able to get from her mom. I told her I didn't think that was a good idea. We listened to tapes on her radio and played Old Maid and had a soda. We then talked about T.V. shows, her dentist, she likes cats and big dogs.

The following morning I related my conversation with Amy to Mike Nail, Mike Smith, and Ken Kobrin, and in a separate conversation to the Judge. I was then instructed by the Judge to approach Amy's mother regarding her willingness to meet with Amy. The Judge had the bailiff summon Mrs. Tonnemacher to his chambers where I was to meet with her. She entered the room with confidence and with an air of hostility. I introduced myself to her and thanked her for meeting with me and I explained our meeting was at Amy's request. I explained that Amy was prepared to tell the truth and she needed her mother's reassurance that she would not be angry with her. At this, Mrs. Tonnemacher became furious and wanted to know who had gotten to Amy and replied that she would not meet with Amy, and that she no longer wished to meet with me without her attorney present. She requested the presence of Mr. Hagler, whom the Bailiff summoned.

I explained to Mrs. Tonnemacher that I was not an attorney, merely a liaison. She was very concerned about what I planned to do with the information that she would not meet with her daughter. I told her beyond informing the Judge and Ken Kobrin that I didn't know what would happen. At this point, Mr. Hagler appeared displaying theatrical confusion as to why Mrs. Tonnemacher summoned him as he did not represent her. He told her he would be happy to recommend an attorney for her. Mrs. Tonnemacher responded with insistence that she had retained him and expressed bewilderment at his action. I offered the phone in the Judge's chambers for Mrs. Tonnemacher to place her call; however, Mr. Hagler urged her that it would be better for her to call from a pay phone and he would show her where it was.

I resumed my visit with Amy in which she kept inquiring about when she would get to see her mom. I tried to avoid the topic, to not have to tell her that her mom refused to meet with her. We crayoned pictures and talked about T.V. shows until we were interrupted by Mr. Hagler who stated he had been appointed by Judge Harris and was requesting that I leave the room. Amy became upset and told him that she didn't want me to leave and that she didn't want to talk with him. At this point, Mr. Hagler ignored Amy and again requested that I leave the room. Amy's protest became louder and stronger and Mr. Hagler was now insisting that I oblige his request. I reassured Amy that I was not abandoning her, but that I would have to get legal guidance as to whether I could remain with her. I left and got Ken Kobrin who confronted Mr. Hagler with the support of Bill Denton, Investigator from the D.A.'s office. Mr. Hagler was told that if Amy wanted me present that I would not leave her alone. Amy continued to express her desire for my presence with her and Mr. Hagler continued to insist that no one would be present when he spoke with her. It was obviously a very heated unresolvable dispute that a Judge would have to settle. Judge DeRonde deferred the

dispute to Judge Harris as the order appointing Mr. Hagler came from him. Judge Harris concluded that Mr. Hagler would be permitted 45 minutes alone with Amy, regardless of the child's desires and that after the 45 minutes the child could meet with us in whatever association she preferred, and that I could see her only by contacting Mr. Hagler and he would inquire of Amy as to whether she wanted to see me. After the 45 minutes with Mr. Hagler, Amy did not request to see me again.

When called to the stand to testify, Amy requested to speak with her lawyer, after which, the Court recessed. The issue was still the supervised visit . . .Amy had not forgotten it, she wanted her mother's reassurance. Mrs. Tonnemacher had retained Dan Russo as her counsel by this time. Meetings ensued with the D.A., Mr. Hagler, and Mr. Russo to set up the terms of the visit. Mrs. Tonnemacher wanted immunity from P.C. 136 prosecution and would not agree to tell Amy she should tell the truth, but would agree to tell her that she loved her. The meeting lasted approximately 40 minutes. At the conclusion, Amy was recalled to the stand and for the first time showed emotional stress, at which time Mr. Hagler requested an adjournment until Monday. It was granted. Mr. Russo and Mr. Hagler stated that they felt Amy would testify on Monday.

On Sunday, January , I was informed that Amy had been released to Foster Home Placement. I called Judge Harris at home to get clarification on the contact order. He reaffirmed his previous order. I called Mr. Hagler and requested that he contact Amy to see if she would like me to visit her. I expressed my concern that she was now amongst total strangers again and that she might need me. He refused my request, stating that Amy had to initiate the contact request. I told him of my conversation moments earlier with Judge Harris regarding the contact order. He responded that he would need to talk with the Judge personally and he wasn't sure when

he would have the time to do that. I again called Judge Harris and related Mr. Hagler's refusal to comply with my request and I requested that Judge Harris contact Mr. Hagler direct. He agreed. Within 20 minutes, Mr. Hagler called me to apologize for the misunderstanding and to say he would contact Amy and would call me between 1:30 pm and 2:00 pm. At 3:30 pm I was still waiting for the call. I was away from home from approximately 3:45 - 5:45. I called Mr. Hagler on my return at 6 pm and he assured me that he tried to call me at 4:45. I reminded him that our agreement was 1:30 - 2:00, and he stated that his meeting became more extensive than he anticipated, but that Amy did want to see me. He provided me with the address, phone number and directions to the foster home. He also stated there were about 8 - 9 children in the foster home. I called the foster home and spoke with Mrs. DeBord and asked her if it was okay if I brought ice cream and cones for the kids. The visit lasted for approximately 1½ hours, 7:30 - 9:00 pm. The visit was strictly social. I asked Amy how she liked the foster home and if everything was okay. She said it was okay, but she preferred to stay in Juvenile Hall. She expressed anger and frustration at the critical publicity about her conditions there. She commented that she wished the press would talk to her about it because she would tell them it's not that bad there that she would rather be there than in the foster home. I asked her why and she stated, "They were nice to me there, and I had my own room. Here I have to share a room with other kids and one girl steals everyone's things." Amy complained that the girl had already stolen all of her candy that she brought with her from Juvenile Hall.

I gave Amy the pictures she had crayoned in Court on Friday and brought her a frame and some construction paper to mount the pictures to frame. We had ice cream, sodas, and framed her pictures. We did not discuss anything about the case or her testimony as we were never alone. There was no privacy in the home with nine children and two adults. I felt Amy

might be uncomfortable with the subject matter under those circumstances. We did discuss very briefly sexual abuse crisis agencies. I gave her a list of the agencies and their phone numbers and encouraged her to call them or me if she needs assistance.

KENT DAVID TONNEMACHER

8/3/83	Intake by District Attorney Mike Nail--notation "Defendant should P.A.C."
8/10/83	Defendant arraigned by Brewer, Deputy District Attorney Kathy Green present. Defendant represented by Ichikawa. Defendant pled Not Guilty, Readiness Conference set 8/24/83. Defendant OR'd.
8/24/83	Telephone call between Ichikawa and Deputy District Attorney Ken Kobrin. Ken Kobrin advises Ichikawa no authority to negotiate due to Mike Nail's P.A.C. note.
8/24/83	Readiness Conference (Judge Harris). Continued to 9/7/83 at defendant's request for Ichikawa to talk with Chief Deputy District Attorney R. Michael Smith or Mike Nail re plea bargain.
8/30/83	Defendant files motion to set a prelim, motion set for 9/1/83.
9/1/83	Prelim set for 9/16/83.
9/15/83	Finkas files motion to quash subpoena issued for Victim Amy Millar due to lack of personal service.
9/16/83	Motion to quash Victim's subpoena granted. I spoke with Victim who advised of her desire not to testify prior to motion to quash. Mike Smith then okayed a Misdemeanor 647a offer and advised if rejected to proceed with 288(a). After motion to quash was granted court denied District Attorney's motion to continue and dismissed case. Defendant rejected 647a offer.
12/19/83	New complaint filed, same charge. Victim and mother subpoenaed for arraignment date -- 1/11/84 at 9 a.m. Ichikawa given notice to appear and copy of complaint.
12/23/83	Ichikawa takes defendant before visiting Judge Gurney and, without notice to District Attorney, has defendant arraigned and prelim set for 12/30/83. Ichikawa later admitted he knew we had Victim subpoenaed for 1/11/84.
12/27/83	District Attorney files motion to continue prelim.

12/28/83 Motion to continue prelim taken under submission. To 12/30/83 to see if District Attorney can get Victim served to appear.

12/30/83 Preliminary Hearing. Victim present. Victim refuses to take oath. Victim remanded for civil contempt. Prelim continued to next court date, 1/3/84 over defendant's objection.

Defendant ordered booked and released.

1/3/84 Preliminary Hearing. Ambrose appears for Ichikawa. Court calls Linda Lyles as court's witness re victim. Finkas moves to recuse District Attorney--denied. District Attorney moves to sever Finkas' attorney relationship with victim--denied. Court appoints county counsel to act on Victim's behalf. Victim refuses to take the oath. Victim remanded--no visits from mother or father. To 1/4/84 for Prelim.

1/4/84 Preiminary Hearing. Defendant with Ambrose. Victim refuses to take oath. Victim remanded. Prelim to 1/5/84 (we had thought Victim would testify per info from Jerry Collins, Deputy Probation Officer).

1/5/84 Preliminary Hearing. Defendant with Ichikawa. Finkas relieved by Court, transcript ordered to State Bar.

Victim Witness Coordinator JoAnn McLevis ordered to meet with Victim. Victim refuses to take oath. Remanded to 1/6/84.

1/6/84 Preliminary Hearing. Hagler has order from Judge Harris allowing him to act as co-counsel on Victim's behalf.

Motion to place Victim in foster home denied.

District Attorney agrees not to prosecute mother for 136 P.C. if meets with Victim as Victim requests. After meeting, mom says she thinks Victim will testify.

Victim called to stand, Victim requests continuance to 1/9/84. Granted.

1/7/84 Judge Harris orders Victim released to foster home per OSC on Petition for Writ of Habeas Corpus. Hearing set for 1/10/84. No notice of request to release defendant given to District Attorney prior to Harris issuing order.

1/9/84 Preliminary Hearing. Victim refuses to be sworn. Defendant rejects 647a offer. Case dismissed.

1/10/84 Petition for Writ of Habeas Corpus denied as moot. Victim placed in custody of motion.

Senator SPECTER. Let me ask both of you gentlemen just one question. That is, it is one I discussed earlier on the constitutional right of confrontation. Do you think that it would be permissible to have a child of tender years, say, 4 or 5, who really needs the protection of not being under the glare of the perpetrator, testify on closed-circuit television with the defendant watching the television screen and having counsel for the defendant access to cross-examine via closed-circuit television, with the only factor absent being the opportunity, the absence of the eye contact, or the potential for eye contact between the victim and the defendant.

Mr. Kobrin, what do you think?

Mr. KOBRIN. I do not see any reason why there should be any problems with that. With a simultaneous broadcast, the defendant can see everything that is going on, and I would be strongly in favor of such action.

Senator SPECTER. The one aspect that would not be present would be the opportunity of the defendant to stare down the witness or to confront in the most direct way.

Mr. KOBRIN. I would also suggest that you might want to consider even going a step further and perhaps suggesting that the defense attorney—both attorneys, for that matter—have their questions of the victim or the child brought through the judge, so that the judge is the one actually propounding the questions, because I have seen defense attorneys in court time and again with the inflection in their voice, the manner in which the question is asked, attack the victim and put the child in a position where she cannot respond.

Senator SPECTER. I think that is tougher to do, Mr. Kobrin.

What do you think, Judge?

Judge YOUNGER. Mr. Chairman, I hate to bring controversy to a mechanism which everyone seems comfortable with—and I do think that both Mr. Kobrin and the attorney from Maryland, whose name escapes me, certainly made an intelligent presentation of how you would do it, if you are going to do it.

First, I continue to have some reservations about the lawfulness of it—and lawfulness of it means getting an appellate court in a State such as mine to go for it—and you might wonder who really wins, if a trial judge does it, and then the whole thing gets dumped. That is one thing.

But you talked about tips and icebergs earlier. The case that actually gets all the way to the courtroom, as dramatic and as tragic as the incidents of which Mr. Kobrin has spoken may be, after all, that is the tip; that is not the iceberg. The far more severe problem that we all have to deal with is the iceberg of the tremendous number of cases which never get anywhere near a courtroom or a videocam, or anything else, because of a lot of kinds of pressures, both in the family degeneration situation that you heard about earlier, or in the "keep-the-family-together" situation we have talked about now. My feeling is that the courtroom part of the problem is the tip, and it is not a very major part of the real world of these overall problems. A modest proportion of the cases, I have a hunch, are damaged by that.

Senator SPECTER. Thank you very much, Judge Younger. Thank you very much, Deputy District Attorney Kobrin. It is that tip of

the iceberg which is all we can work with, in the courts or in the Congress, and by seeking to influence the judicial process and the way we deal with these problems, we seek to effect a tremendous quantity of conduct and human behavior that goes on unobserved. That is what we are up here for.

Thank you all very much.

[Whereupon, at 11:43 a.m., the subcommittee was adjourned.]

CHILD SEXUAL ABUSE VICTIMS IN THE COURTS

TUESDAY, MAY 22, 1984

U.S. SENATE,
SUBCOMMITTEE ON JUVENILE JUSTICE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room SD-538, Dirksen Senate Office Building, Hon. Arlen Specter (chairman of the subcommittee) presiding.

Present: Senators Hawkins, and Grassley.

Staff present: Mary Louise Westmoreland, chief counsel; Bruce King, counsel; Mike Wootten, counsel (full committee), and Tracy McGee, chief clerk.

Senator SPECTER. We are ready to begin this hearing of the Subcommittee on Juvenile Justice of the Committee on the Judiciary to consider children's testimony in sexual abuse cases.

Without objection, my prepared opening statement will be made a part of the record.

[The following was received for the record:]

PREPARED OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, CHAIRMAN, SUBCOMMITTEE ON JUVENILE JUSTICE

This is one of a series of hearings held by the Juvenile Justice Subcommittee to explore child molestation. Today our focus will be on children's court testimony about being sexually abused.

The molestation of children has now reached epidemic proportions. Even by conservative estimates, a young American will be sexually molested once every two minutes. Yet child sexual abuse is a problem that all too often is pushed under the carpet. Parents don't want to believe it. Prosecutors look the other way. Even judges often prefer not to face the bitter truth. Meanwhile, children are left helpless, angry, and cynical, convinced that "the system" simply cannot be trusted.

In recent weeks, the Subcommittee has received letters and telephone calls from parents across the country. Parents from Missouri and Texas have written of prosecutors who will not press charges despite their children's urgent need for protection and help. We have heard mothers in California, Pennsylvania, South Carolina and Virginia complain of judges who refused to believe their daughter's accounts of being raped. The stories in these letters and calls illustrate the widespread skepticism that greets children's statements about sexual abuse—skepticism that generally is unjustified, according to most experts.

As a result of such skepticism, too few cases of child sexual abuse are reported and too few reported cases are prosecuted. Today's hearing, however, will examine what happens when cases do get to trial and children are summoned to tell their story. As we will hear, testifying can be a terrifying experience for these children. They often are asked to testify while their abuser sits a few feet away, often after threatening them if they tell the truth.

What can we do to make children more comfortable about testifying without infringing defendants' right to expose untruths? Some have suggested videotaping children's statements outside the courtroom, or placing a one-way mirror between

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the defendant and the child. Others have stressed the need to prepare children before their ordeal, so they know what to expect. I look forward to discussing these and other suggestions today.

I also am interested in exploring the issue of children's competency to testify. When, for example, is a child too young to be a competent witness? How can we determine whether a child's testimony can be relied upon? What standards ought to be applied? What can be done to help children become better witnesses? Also, is there a sound basis for laws requiring independent corroboration of children's testimony in these cases?

In addition, I am concerned about media access to child abuse trials. A few weeks ago, I chaired a hearing on media coverage of rape trials. Many of the same concerns apply here. Like rape victims, abused children may experience media coverage as a form of revictimization. Testifying directly in the face of a molester is hard enough—add a room full of reporters and television cameras and a child often will be overwhelmed. If the victim's identity is then publicized, his or her suffering may again be compounded. How can we minimize this suffering while respecting the constitutional requirements of open trials?

To help us examine these and other related issues, we have a distinguished and diverse group of witnesses here today. First we will hear from three people involved in the Manhattan Beach, California case in which more than 100 pre-schoolers allegedly were sexually abused. Lael Rubin, the chief prosecutor, will begin, followed by Kee MacFarlane, a nationally respected expert on child sexual abuse and a therapist who has worked with children in the case. Next, we will hear from a mother whose daughter was the second child to reveal the alleged abuses. She requests that she not be televised, so I would ask that the cameras be focused elsewhere when she testifies.

Our next panel will include, first, a girl from Maryland who has testified in court. She will be accompanied by her mother and will tell us how she felt about taking the stand. We also will hear from Bill Arnold, who will tell about his stepdaughter's experience.

Our final panel includes Gary Melton, a psychologist and legal expert from the University of Nebraska. Mr. Melton is here respresenting the American Psychological Association. Finally, we are pleased to have with us Joyce Thomas, Director of Child Protection at Children's Hospital here in Washington.

I want to thank all our witnesses for testifying today. I look forward to a productive and illuminating hearing.

Senator SPECTER. By way of introduction, this hearing is to consider a variety of questions relating to the competency of juvenile witnesses and procedures to be utilized in securing their testimony.

The Judiciary Committee has responsibilities for oversight and legislation on procedures in Federal courts which touch upon juvenile witnesses and raise the issues of competency in procedures for taking juvenile testimony, and the Juvenile Justice Subcommittee has responsibility for the Office of Juvenile Justice and Delinquency Prevention, and it may be that in this burgeoning field, there ought to be some very substantial attention and study by the Office of Juvenile Justice and Delinquency Prevention to the issue of juvenile testimony in these very sensitive and very difficult cases.

The issue has arisen in the *McMartin* case about what procedures will be used on testimony by juveniles, whether there can be videotape transcripts, and it raises a very important consideration on the defendant's constitutional rights to confrontation, as to whether the defendant has a right to look his accuser in the eye and in effect have an opportunity to stare down an accuser, a standard which may have some greater basis where the witness-victim and the defendant are both adults and can handle the situation, or whether it comports with due process of law to have a child testify on videotape out of the presence of the defendant, but where the defendant can see and hear fully what the victim says and have the defense lawyer cross-examine by use of a videotape. It

raises the collateral question as to television coverage of these kinds of cases. This committee had hearings on the New Bedford, MA, rape case and considered the balancing of the factors as to the desirability of acquainting the public with the very important issues which are involved in a rape charge or on molestation of juveniles, a balancing of the rights of the witnesses to anonymity, not to be identified, not to be harassed, not to be followed. And there is an additional factor, more intense in dimension, as to juveniles, as to the subsequent effect of any such testimony on their future lives.

I know from the point of view of a prosecuting attorney that the additional consideration on a case is State versus defendant, where the witness-victim does not make a decision as to whether the case will go forward; that is a matter for the State to determine, and the State's agent is the prosecuting attorney. It may be that there is such disastrous effect on some juveniles that there ought to be some further consideration as to whether some of the cases ought to be brought at all, or where there are a number of witnesses, whether some can be left to carry the burden of the prosecution. These are all very difficult issues, and they are evolving as we are coming into an era of seeing more and more cases of molestation of children and the complex issues which they present.

Those are some of the questions which we will be inquiring into during the course of the hearings today.

I am pleased to have joining on the panel the distinguished Senator from Florida, Mrs. Hawkins, who has been a leader in missing children's issues. She has joined this subcommittee on a number of hearings in the past, authored important legislation on the subject, and has contributed much to this entire issue when, in the children's caucus a few weeks ago, Senator Hawkins at substantial personal risk, made some disclosures which I think have advanced the cause of juveniles very substantially.

I am pleased to call on Senator Hawkins at this time for an opening statement.

Senator HAWKINS. In the interest of time, I will also submit my opening statement in the record. I just want to commend you, Senator, for continuing your interest in this subject, for pursuing what I feel is long overdue, and that is the official right of children in the judicial system. Obviously, we have a long way to go, but with your good leadership, we will make good strides. I thank you for letting me participate here. I have long been interested in the interests of children.

[The following was received for the record:]

PREPARED OPENING STATEMENT OF HON. PAULA HAWKINS, A U.S. SENATOR FROM THE STATE OF FLORIDA

Mr. Chairman, I appreciate your permitting me to join you here today. Although I am not a member of the Senate Judiciary Committee, I have a strong personal interest in this subject of children, and I am very impressed with your efforts to increase the public's awareness of the need for judicial and administrative reforms regarding juvenile justice.

Earlier this month, you held some very disturbing hearings on the legal rights of sexual abuse victims. Disturbing because when the children and their parents finally got the nerve to report the abuse, the administrative and judicial system wouldn't take them seriously, just dismissing it as an emotional aspect of a bitter divorce or custody battle.

It took us years to drag the federal government into this issue, to enact legislation which mandated the reporting of suspected cases of child abuse. But these statutes are worthless if we don't stringently enforce them and investigate allegations of abuse. For these child protection statutes to be effective, we must insure that our judicial and executive branches are responsive to the special needs of a child victim of sexual abuse.

I have already had an opportunity to discuss this issue with our first witness, Kee McFarland at great length, but I look forward to her testimony today as well as the other witnesses who have agreed to testify today. For many of the witnesses it will be a painful process of remembering a time of our lives that we would prefer to put behind us. It was very difficult for me to speak out, but I have been very gratified by the response. People have written to tell me that my public announcement has helped them. I know that your courage in discussing this issue to day will help others avoid the trauma that you have experienced.

Senator SPECTER. Thank you very much, Senator Hawkins.

I would like to say at the outset that I will have to interrupt the hearings very briefly for a few moments to go to the floor on the agent orange case, which the leadership has scheduled this morning for 9:30, and I have to be present there for just a few moments to introduce an amendment, but it will not be a long delay.

[A brief recess.]

Senator SPECTER. At this time, our first witness is Ms. Lael Rubin, the deputy district attorney of Los Angeles, who is in charge of the *McMartin* case. She has had very extensive experience in this field and, I think, can shed considerable light on some of the very important questions which we would like to address.

I would like to call at the same time, Ms. Kee MacFarlane, who is the director of the Child Sexual Abuse Diagnostic Center of the Children's Institute International, in Los Angeles, CA. Ms. MacFarlane is an expert in this field and is also very deeply involved in the *McMartin Manhattan Beach* case.

If you ladies would step forward at this time, we would be pleased to hear from you, and we will start with Ms. Rubin.

Thank you very much for coming, thank you for joining us.

STATEMENT OF LAEL RUBIN, DEPUTY DISTRICT ATTORNEY, LOS ANGELES, CA, AND KEE MacFARLANE, DIRECTOR, CHILD SEXUAL ABUSE DIAGNOSTIC CENTER, CHILDREN'S INSTITUTE INTERNATIONAL, LOS ANGELES, CA

Ms. RUBIN. Thank you very much.

Senator Specter, Senator Hawkins, I am a Los Angeles County deputy district attorney and the chief prosecutor in the *McMartin Preschool* case, the *Manhattan Beach* child sexual abuse case.

During the forthcoming preliminary hearing and at trial in this case, we intend to call approximately 35 children who range in age from 4 to 10 years. These children have all suffered psychological trauma as a result of the acts which have been perpetrated against them When they testify in these proceedings, subject to cross-examination by seven defense attorneys, their testimony will no doubt exacerbate such psychological trauma.

We are urging the California courts and the California Legislature to consider the needs of these children to do whatever is necessary and constitutionally permissible, to prevent any increased psychological harm to these children without at the same time impairing the constitutional and statutory safeguards afforded these defendants and all persons charged with crime.

I urge this subcommittee to do the same.

In the *McMartin* case, we are asking that the court allow the children to testify by way of two-way closed circuit television as an alternative to their testifying in an open courtroom a few feet from the defendants. Such contemporaneous examination by means of closed circuit television permits examination of the witnesses by both the prosecution and the defense in the presence of the defendants. The defendants therefore will not be deprived of their sixth amendment rights of confrontation and cross-examination.

Two-way transmission of the testimony will allow the defendants and each child witness to see and hear each other. As such, the testimony will be presented in a manner which is legally indistinguishable from testimony given by a witness who is physically present in the courtroom.

Further, we will be applying for a court order that the children's testimony at the preliminary hearing be preserved on videotape. Under California law, upon timely application, when a victim is 15 years of age or less, and the defendant is charged with certain specified sex offenses including child molestation, the court must grant our request. Then, if at the time of trial, the court finds that further testimony would cause the victim emotional trauma so that the witness then becomes medically unavailable to testify at trial under the provisions of the evidence code, the trial court may admit the videotape of the victim's testimony given at the preliminary hearing.

Senator SPECTER. Ms. Rubin, are you saying that it is a matter of right under California law, where someone is 15 years or less, to have the preliminary hearing videotaped?

Ms. RUBIN. It is a matter of right under California law when a defendant is charged with sex offenses, including rape and child molestation. Yes, it is a matter of right. It is mandatory if the prosecution makes application within 3 days before the time of the hearing.

Senator SPECTER. Have you made the application yet?

Ms. RUBIN. Yes, we have.

Senator SPECTER. Has it been granted?

Ms. RUBIN. We have not yet had a hearing on our request for closed circuit television and the application for videotape. But we certainly expect the videotape request to be granted.

Senator SPECTER. But California law has a specific provision which allows for closed circuit television and videotape on the preliminary hearing is what you are saying.

Ms. RUBIN. Well, there are two separate sections. The section that provides for this two-way closed circuit television is California Penal Code section 868.7. That is a matter which is discretionary with the court, and the court may allow two-way closed circuit television as an alternative to the prosecution's requesting that the preliminary hearing be closed.

Senator SPECTER. But if the preliminary hearing is closed, the defendant would be present, of course.

Ms. RUBIN. Yes; however, it is our intention that if, in our case, the defense requests that the preliminary hearing be closed, since two-way closed circuit television testimony is in our view, and according to the meager case law that we have as precedent, is legal-

ly indistinguishable from a witness physically being present in court, then it is our belief, and we are going to urge the court that even if the preliminary hearing is closed to the public that the court should allow the children to testify by way of closed circuit television.

Senator SPECTER. You say the precedent is meager. Do you have a specific ruling on closed circuit television as being sufficient for the defendant's right to confrontation?

Ms. RUBIN. We have a recent case of the California Court of Appeals in which the request for closed circuit television was not made. The court speaks of the fact that it is legally indistinguishable, but it did not have to rule on that issue because the request had not been made.

In another case coming out of Los Angeles County, we have a municipal court judge who has granted a request for closed circuit television, but of course, that is not binding precedent on another municipal court judge.

Senator SPECTER. Senator Hawkins raises a question—why don't you pose the question, Senator Hawkins?

Senator HAWKINS. If the prosecutor decides not to request the videotape, can the parents of the child request the prosecutor to request that it be videotaped?

Ms. RUBIN. Well, the parents of the children do not have any formal legal standing to make that request. They can, of course, informally make that request of us. As a matter of course, we would be, and we are in this case, requesting that the children's testimony be preserved on videotape. This is not a new procedure just dealing with children. I have had experience in having other people's testimony preserved on videotape, for instance, someone who is elderly or ill and may not be available for trial, and courts have routinely granted the request that that testimony be preserved on videotape.

Senator SPECTER. Senator Hawkins raises an important question about the rights of parties to private counsel. There are many States which do accord private prosecutors a term which is used to describe as you know frequently the prosecuting witness. Many States do accord the witness and the family the opportunity to have counsel participate—not to take over, because it is the State's function, and you operate as deputy district attorney, representing the State of California.

Does California give any status at all to private counsel retained by the victim?

Ms. RUBIN. No; California does not grant such status.

Senator SPECTER. So what you are saying is that it is discretionary with the court as to whether they will close the proceedings and discretionary with the court as to whether they will grant closed circuit television.

Ms. RUBIN. Yes; that is correct.

Senator SPECTER. And when you say "legally indistinguishable," that is a nice phrase. What is your own view as to the element of the defense contention that the defendant ought to be able to look the victim in the eye when the victim is testifying?

Ms. RUBIN. By way of two-way closed circuit television, with a monitor in the courtroom and a monitor in another location where

the children will physically be, the defendant will be able to look at the child on the monitor, and the child then has the same monitor in another room where he or she can look at the defendant. We have had cases in California where convictions have been overruled because there was only a one-way transmission, or a defendant could see the child, but the child could not see the defendant. It is our belief that with a two-way system, that is what I am referring to when I am talking about "legally indistinguishable;" they both are able to and have the right to see one another.

Senator SPECTER. So the only factor absent would be the domination or the potential intimidation of the defendant in the presence of the victim?

Ms. RUBIN. Yes; that is correct. And it is our belief that the sixth amendment right does not grant constitutional status to the defendant being able to intimidate any witness by his physical presence.

Senator SPECTER. So the victim can look at the monitor if the victim chooses to, or the victim need not if the victim chooses not to.

Ms. RUBIN. That is correct.

Senator SPECTER. Just as in a courtroom, the victim need not look at the defendant if the victim chooses not to. The defendant does not have a right to have the victim look at the defendant when the victim is testifying.

Ms. RUBIN. That is correct, that is correct.

Senator SPECTER. You may proceed.

Ms. RUBIN. Thank you.

Whether or not a proceeding is closed to the public, a child victim must be entitled for support to the attendance of a parent, guardian, or sibling of his or her own choosing. Depriving the victim of that kind of emotional support of a parent or friend defeats the purpose of once again considering the needs of the child in preventing any increased psychological harm.

It is our belief—and California law once again grants us that status—that if in fact a preliminary hearing is closed to the public, exclusion of the public should not exclude a support person for that child victim.

We are also urging the California Legislature to allow us to be able to use leading questions in examining child witnesses. As you know, leading questions have been permitted only in very special circumstances. It is our belief that legislation must permit the use of leading questions in the examination of young children.

Senator SPECTER. Does California now not permit leading questions with young children?

Ms. RUBIN. That is correct. We have several bills pending in the California Legislature, one of which if passed will allow for that.

Senator SPECTER. Because I think your rule is at variance with common law on that subject. I think the general rule is that you can ask a child of tender years leading questions.

Ms. RUBIN. That is correct. California law, however, does not provide for that, except for certain specified preliminary kinds of questions.

Further, as part of this legislation, it is our belief that we should be able to use certain hearsay evidence regarding child victims.

Evidence of a statement made by a child under the age of 7, describing any act of sexual or physical abuse, should not be made inadmissible under the hearsay rule, provided that the statement was made under such circumstances to indicate trustworthiness.

The court should consider, it is our belief, the child's age, any corroborative physical evidence, and the relationship between the witness and the victim and the spontaneity of the statement in determining trustworthiness. The use of such hearsay statements would overcome the present obstacle we face in being unable to qualify the very young child as a competent witness.

Further, it is essential that every effort be made to ensure that the same prosecutor handle all aspects of a case from its initial stages through trial. Child victims like all traumatized victims find themselves describing the horrors perpetrated against them to many different people. They are interviewed by the police, by doctors, and/or therapists and lawyers prosecuting a case. They also must repeat their testimony at least several times in different court proceedings. Providing that one prosecutor follow the case from beginning to conclusion aids the child in proceeding through the often bewildering maze of the criminal justice system.

At the present time, there are no sanctions that are imposed against the media for revealing the name or identity of a child victim. Courts have taken careful precaution to safeguard the true identity of juvenile offenders. We have found that there is thus greater protection afforded juvenile offenders than there is for child victims.

We urge the legislature and this committee to rectify that inequity.

In conclusion, I urge this subcommittee to consider the procedures which I have briefly discussed as innovative approaches which will recognize the special needs of children who are crime victims. Such approaches will not interfere with the defendant's sixth amendment rights.

Thank you very much.

Senator SPECTER. Ms. Rubin, on the subject of the impact damage to the child, are there any circumstances where you would think it appropriate for the State to decide not to prosecute where the indications were that there would be very extensive damage to the victim witness?

Ms. RUBIN. That is something that we do all the time. In fact, in this case, the children's institute and Kee MacFarlane and her staff have interviewed at this point over 250 children. It is our intention during the course of the trial and the preliminary hearing to use about 35 of those children. We have decided that it would be far too damaging to use as witnesses in court the many other children who have been interviewed and evaluated and described sexual and physical abuse in this case. There are children who have had epileptic attacks, have had asthma attacks, and there is no purpose to be served by having them as witnesses.

Senator SPECTER. Well, that is a judgment you can come to, as you say, no purpose to be served by having them as witnesses where you have other witnesses who can carry your case and establish your case. But how about when the case would rise or fall on having one or two child witnesses, but the evidence was that they

would suffer enormously by being compelled to tell the story as you have indicated, on so many occasions; would there ever be a case, in your judgment, where the prosecution ought to abandon the case in deference to the impact on the victim?

Ms. RUBIN. Yes, absolutely. That is a matter of discretion from the initial inception of our making a decision to charge a case. We obviously want to proceed with the case and convict the guilty, but at the same time, when there are clear indications that proceeding would cause substantial increased harm to these child victims, and any other victims, then we would make that decision to abandon the case.

Senator SPECTER. And Senator Hawkins asks, "And let the molester go?" The answer is yes.

Ms. RUBIN. Well, under those circumstances, I think when we weigh the harm that would be incurred to the child, I think that that is going to have to be a decision that we will have to make.

One of the provisions of one of the proposed pieces of legislation in California would allow us, if passed, to use hearsay testimony when a child is under the age of 7, and it is particularly in that situation, not only when there is a child who is too young to qualify—perhaps is age 2½ or 3, and would not qualify as a witness—but also, I think that provision would be extraordinarily helpful when the child would suffer additional serious psychological harm and physical harm from testifying in court.

Senator SPECTER. Well, I am not so sure you are right about letting the molester go, and I am also not so sure you are wrong about it. I would say that it would be a significant departure from what prosecutors customarily think about on prosecutions. I have not been in the business for a short while, but prosecutors are very loathe, as you well know, to let defendants go, molesters go, or serious charges be dropped, in deference to the impact on the witness. But I think we are facing a unique sort of situation here when you deal with children and the kind of impact there, and then the fallback position to the hearsay evidence is a way which it can make out a case, but that raises very substantial problems on an issue of sufficiency of evidence with hearsay only. It may be one thing if there is direct testimony corroborated by hearsay, as opposed to having only hearsay evidence.

Would you care to question before we hear from Ms. MacFarlane?

Senator HAWKINS. Aren't you leaving some room for parents to influence the child in saying, "We are not going to go forward in this case, because we do not want the family name dragged through the paper," and that could cause an awful lot of trauma in the child, also, to be torn between the prosecutor who wants to prosecute, and the family who says, "We are not having any more of this."

Ms. RUBIN. Well, obviously, this is a complex situation, and we cannot use a child as a witness if we are not going to have the cooperation and support of the parents. That would be counterproductive. So our role is really dual. We need to evaluate the child and make a determination that he or she would be a good witness, and also enlist the aid and the support of the parents.

We have that task that we often do not face in other kinds of cases.

Senator HAWKINS. But isn't it true that you do not experience that same pull if the child is an offender. The parents have nothing to say. From the little bit I know about the law, if the offender who is caught is a child, the parents do not have that choice as to whether he is brought to trial or not.

Ms. RUBIN. That is true, and once again, I think that is a very astute observation because the law protects juvenile offenders or the privacy of juvenile offenders much more than it does the privacy of juvenile victims. So there really is a dual standard in that regard, and I think it has only been within the last couple of years where there has been such support that has mounted for victims and victims' rights groups that these issues have really come to the forefront.

Senator HAWKINS. Thank you.

Ms. RUBIN. Thank you.

Senator SPECTER. Ms. MacFarlane, we welcome you here and look forward to your testimony.

STATEMENT OF KEE MacFARLANE

Ms. MACFARLANE. Thank you.

I would like to share a few aspects of this crime and the handling of these kinds of cases that I have learned from working within various systems in these cases, but probably more that I have learned from children who have been through our criminal justice system, and try to give you a little bit of a snapshot of what we are up against.

I think that first, we need to consider the crime itself. It is one that begins with little or no physical evidence. It is not like any other form of child abuse, where you have something that alerts people to this crime. Really the only way that we ever find out about it usually is that a child tells us in one way or another that something has happened. There is usually a lack of physical force and violence involved in these cases. There are rarely any corroborative witnesses, eyewitnesses, corroborative evidence. There are few grounds often even to establish the elements of the crime, motive, opportunity or fact. There is usually a time lapse between the abuse and its discovery, which adds to the disbelief: "This couldn't have really happened, because the child would have come and told me, or I would have noticed." More often than not, we find out about cases long after they have occurred, when there has been a loss of evidence, a confusion over time and the memory of the children as to the facts.

We are up against an incredible problem of low credibility of these children. We have a striking increase of cases in California involving children under the age of 5 years old, and I think that is being reflected elsewhere in the country. The children are regarded as suspect from the time they open their mouths to tell us what has happened. We have an incredibly strong disbelief system in our country, from everyone from doctors to parents. It is not something that we want to believe can happen.

As my friend, Lucy Berliner, in Seattle, says, "Everyone hates child molesters until they find out they know one very well,"and then they have a very difficult time; the scales shift, and suddenly, their incredulity is aimed at the child.

Children do forget and confuse facts all the time. They forget facts such as time and dates of occurrences, and therefore they are regarded as unreliable. They will tell you things like, "Oh, I remember exactly when it happened. It happened a long, long time ago" which does not help us in trying to establish a crime in California within a 3-month span of time.

On the other hand, I find that they have incredible memory for things that are very traumatic and upsetting to them, which we do not take into consideration.

We also do not take into consideration, as Senator Hawkins was just pointing out, their ambivalent feelings about the people who abuse them. They start off, usually, by feeling guilty, to blame, and at fault; that is why they are so reluctant to tell. And they often minimize what happens to them, and they give the story to you in very small pieces, so that you start with what they see as the least terrible thing that happened to them, and they will tell you that is all that happened. And then, when they realize that you are not going to be shocked or blame them or add to their guilt, they will give you a little bit more. Now, when that happens, we look at children and we say, "Well, they must be lying. First, she told me she was only touched with a hand, and now she is telling me there is so much more. She is just fabricating and adding to it." In fact, it is a very clear pattern of giving just as much as they think adults can stand to hear. Often, they are right. Often, when they get the reactions of our shock and disbelief, we do not get the rest of the story.

We underestimate the positive feelings that children can have for the people who molest them, which is not to say that they in any way participate in or contribute to their abuse, but they get very, very confused. Over and over, we hear children say, "How could he do that? He was so nice. I really liked him. He gave me lollipops and took me to the park."

We underestimate how fearful they are of these people. Sexual abuse, I think, is something that is almost always shrouded in secrecy and silence, and almost always accompanied by some kind of threats to children. That is, I think, one of the most underestimated aspects of this problem when it gets into court. They are so easily bribed and easily tricked that they come into court—we deal with cases all the time where children come into court truly believing that the people in that courtroom have magical powers and can control the courtroom proceedings. So that we have procedures which we just see as a part of due process, where children are totally misinterpreting what is going on. Our prosecutors fought very hard in Los Angeles to keep the defendants in this case in prison, without bail. Because of the belief system of children, still to this day, I have children coming in all the time and telling me, "That is not going to do any good. They can walk through the bars. They can bend the bars. They can walk out of prison." They do not even believe that jails can hold defendants when children have been so threatened.

So they are the perfect victims of the perfect crime, in many ways. And abusers count on their ability to silence children and to shroud their behaviors in secrecy, and it works very well. What happens when they become known to our system is that our actions, our methods, and our due process act to enforce oftentimes that silence—or, worse, result in retractions from these children.

So what you can see is that we, in the system designed to help them and bring about justice, actually contribute to the ability of child abusers to act with impunity in some ways, because we treat these cases like they were burglaries or bank robberies, and we scurry about in the same kind of evidence chase, and we use the same kinds of measures as we do for adult crimes. We discount the very things that lock children back into silence. It is the old, "When all you have is a hammer, every problem becomes a nail." And that is what I think has happened with these kinds of cases. Children, as Ms. Rubin was saying, are exposed to multiple interviews and interrogations. When we began interviewing children in Los Angeles, we were seeing an average of 15 to 25 interviews prior to the time they came to us. We were ordered by the court. I was seeing children interviewed as many as 34 times before they came to me.

Senator SPECTER. But why so often?

Ms. MACFARLANE. Some of it is, I think, that most of our systems, they have different mandates to be involved, and they see themselves as having to be the only one that can do their part of it. The police think they are the only ones that can do a police interview, and the doctors think they are the only ones that can do a medical one, and the social workers, to do that, and departments of social services, et cetera. In cities where there are not vertical prosecution units, or in even our cases, where they do not go through our vertical unit, you end up with three or four different DA's, just on the same case, and half the time, the child will meet them in the hallway on the way into the courtroom.

We have a tremendous territorialism, and we are dealing with different disciplines. Try to convince an attorney that a social worker or a doctor can do the same interview that they need to have done, or vice versa.

And what happens over time is not only just the whole shutting down process of children being less and less willing to tell you this, but the other thing happens is they lose what you see on the first interview. What we capture on videotape on first interviews is an incredible kind of spontaneity, this eye-opening reality that comes from children's first descriptions of abuse. What you see in court and what juries see is something very different—a child with a flat affect, a face that looks emotionless, often because they are terrified, but also because they have said it over and over and over, so a jury sees a child, even in cases where we haven't been through that much, where they take anatomical dolls and they say, "He touched me here, here, and here, and on the other side." And if there are multiple abusers, children will often say, "Well, they did the same thing as the other one." And they look very blase about it. Some of that has just become a defense, and juries do not believe them.

The same thing happens in medical abuse, where children are reraped in medical systems in the name of trying to get this evi-

dence, and sedated, and put through screaming examinations, where we have just—we will not do them, but I have seen them done where children come out, screaming, "That is worse than what happened to me." Children are still routinely polygraphed in a lot of States. Have you ever had to try to explain that to a child? "Your daddy"—or the alleged abuser—"does not have to have this, because he is a grownup, and he has the right not to have this, but you are a child, and so you really need to take this test, and it does not mean that we do not believe you, but it just means we have this little machine to tell us if you are lying." Lots of cases are dropped after polygraph examinations. I think that is a real clear message to children. And again, the multiple, uncoordinated court appearances I think in a Juvenile Justice Subcommittee, we need to, like in all cities, look at the combinations of juvenile court, criminal court, and divorce court. These cases are simultaneously going on in all three courts, and many cases are simultaneously being processed through all three, with very little or no coordination whatsoever.

From the eyes of children in court, I have learned a lot of things. The first time I got involved in a case involving a child, I did not bring Kleenex. I have never done that since. After I realized that you had to have Kleenex to help them through crying spells, I realized we had to talk with parents about bringing clean underwear. Oftentimes with preschoolers, what you do is you get them in, you sit them on three phonebooks, they sit up in front of an overhanging microphone, they look out over a perch they cannot even see over, they spot the alleged abuser, and they wet their pants.

Even now, after a case last year, I would also say we need to bring towels and things for the times they go in the back room and throw up all over you, they are so terrified.

We have seen, as Ms. Rubin has said, asthma attacks, epileptic attacks in court, stuttering, children going mute—and not from constant, ongoing badgering, which is what you always hear defense attorneys portray it as—as much from the environment of the court itself.

You listen to children describe court. They will tell you that the man or woman in the uniform with the gun is there to maybe arrest them. You try to explain what a bailiff is. If you do not get a chance to do that, they will say, "I am not sure why they were there, but they had a gun, and they were looking at me mean." Ask them what a judge is for; they will sometimes say, "I think he is going to put me in jail."

They often perceive their role in court as that of defendant, regardless of how it may be explained to them on the way into the courtroom.

We have had children, even in this case, who have refused to testify because they have thought that one or another of the attorneys hated them, because of the look on their face. That is one of the difficulties of nonvertical prosecution, when you switch prosecutors, that relationship is crucial to children, that this be somebody who is their friend, who is their lawyer, and they can say—there was a little girl who refused to go into court on a case recently, where she just described what happened beautifully up until that point and said, "I think the lawyer hates me."

I said, "No, Honey. Why do you think that?"

And she said, "Well, because she crosses her arms when she looks at me."

They have their own perceptions of the world. When they look out at even the motions of defendants—that is why we call it the right to intimidation—there are all different ways to do that. You do not have to be threatening or menacing as a defendant. You can sit there and cry. It is probably the most effective one that there is, to look into the eyes of a child who has befriended you and cry in front of him.

So my feeling is that the entire environment is set up to silence these children, just as the abuse itself is designed to silence them. In the Hippocratic Oath, there is a phrase that says, "First, do no harm." I think it is something that we, involved in the criminal justice system, should take to heart just as much.

I do not mean to say that we need to do anything that impedes due process. I am not saying that we should tilt the scales all the way to the other end, and I am certainly not saying that because a child says something, it must be true. Children do lie; they do make up things. More often than not, what I see them lying about is to defend themselves and to protect themselves, and to stay out of trouble. That is how a lot of their lying applies to child sexual abuse. They lie, more often than not, in my experience, to deny abuse than they ever do to admit it.

Senator SPECTER. Are there any generalizations which you have found which are useful in evaluating when children are not telling the truth when they make a complaint about sexual abuse?

Ms. MACFARLANE. For me, the ways of determining sexual abuse are two. The first battle is to get them over their fear; if they have been abused, to get them to acknowledge that it has happened. Once you do that, you get to a level of detail with them that tells you whether or not they know what they are talking about. This is not something they routinely get to find out about on television or in books.

Senator SPECTER. Have you interviewed children who have made complaints about sexual abuse where you did not believe the child?

Ms. MACFARLANE. Two children in 13 years, I think, that I have been able to determine were—and what they were doing was parroting something given to them by an adult.

Senator SPECTER. How many children have you interviewed in 13 years?

Ms. MACFARLANE. I do not even know. I would say hundreds, certainly hundreds.

Senator SPECTER. And it is your view that only two among the hundreds did not tell you the truth when they complained about sexual abuse?

Ms. MACFARLANE. In terms of the total, and what I have seen a lot of times is children who describe one thing or another which may be misinterpreted, may be something else, in terms of children what you might say "put up to" relating an experience about sexual abuse that they themselves even later to acknowledge was not true, yes. By the time I see most children, they have gone so far down the criminal justice system that usually, what they have seen or described has been established to some degree.

But I do not find them, especially preschoolers—I do not know any preschoolers, I think, that I have seen who I would say have lied about sexual abuse. They may describe something which they totally do not understand, which often may be misinterpreted by adults. What they describe, they do not even know as sexual a lot of the time.

Senator SPECTER. You are attaching a very high degree of reliability, then, based upon your experience as you see it, when you assert that among the hundreds of preschool children whom you have heard testify about sexual abuse, that you have believed them all?

Ms. MACFARLANE. No; and I have not seen hundreds testify. Most preschoolers do not ever testify.

Senator SPECTER. Well, aside from the issue of testifying. What I am looking for here is your own personal evaluation, based upon the extensive experience you have had, as to what is the degree of credibility.

Ms. MACFARLANE. It is difficult to answer because so many preschoolers cannot describe what it is that has been alleged to have happened. I see many cases that I come out of saying, "I do not know what happened. I am not sure." But of those children who describe sexual—who are able to describe—sexual acts with adults, especially preschoolers, I have seen very, very few who I do not believe they know what they are—they do not know what they are talking about, but what they are describing———

Senator SPECTER. You say you believe them essentially, because if it were not true, they would not know what to say?

Ms. MACFARLANE. For most of them, that is true. They do not even know they are describing—the descriptions we have on tape over the years of, for example, ejaculation, never comes out as a description of a sexual act. They do not even know what that is. What they are doing is often describing somebody going to the bathroom on them, but describing it in such a way that you know what they are talking about and they do not. These are descriptions by 3-, 4-, and 5-year-olds. The same with oral sex. And they say, "Why would somebody want to do that?" I find oral sex to be probably the most common form of sexual abuse that I see in preschoolers, and it leaves the least visible signs. But children are able to describe it in vivid detail without understanding what on earth the purpose or reason of that could be.

It is very hard not to—I think the graphic descriptions could probably be spared the subcommittee, but it is very hard to hear these descriptions and try to imagine where on earth else they could come from—tastes, smells, descriptions like that. I think in some ways, that is why listening—all you have to do is really listen to preschoolers to understand that this problem in this country is very real.

Senator SPECTER. Did you make a distinction between preschoolers and children who have been in school? Is there some point where their experience is sufficient so they are not necessarily reliable in their descriptions?

Ms. MACFARLANE. Well, there is certainly a point in their experience and their cognitive development level where they understand about sexual matters, and then you are not dealing with the same

kind of naivete. But again, it is still a matter of their ability to provide a level of detail that helps you understand what it is that they are saying.

Senator SPECTER. We will take a 10-minute break at this point, and I will try to be back at 10:40.

[Short recess.]

Senator SPECTER. May we have Ms. Rubin and Ms. MacFarlane back, please?

I regret the delay, and by way of a brief explanation, I would say that each of us in the Senate have a number of committee responsibilities, and they very frequently overlap. And this hearing was set at a time long before we knew that agent orange was going to come up this morning on the floor; and I am a member of the Veterans' Committee and have responsibilities on that subject, and when I was present there, expecting to go right on, there was another amendment which was supposed to have finished up, but took a few extra minutes. So I am sorry to have kept you.

We were in the midst of Ms. MacFarlane's testimony, and I would ask you to continue.

Ms. MACFARLANE. Thank you, Senator.

I just wanted to add a couple of points about what I think we can do. I do not mean to just be the voice of doom. But I think it is very important for us to understand that a child's view of the world is very different from an adult's and colors the way that they respond to their world. I believe that children are best understood when they are often perceived as people who come from another place, like another planet or another country, and if we brought in someone from a totally foreign culture to ours, who spoke a completely different language, brought them into a courtroom, sat them at the witness stand, and began to ask them questions without an interpreter, and without any knowledge of their culture or their language, we would have tremendous communication problems, and that is just what we have today in court.

Senator SPECTER. I am sorry, I am going to have to interrupt for just one moment. I will be right back.

[Short recess.]

Senator SPECTER. I regret one additional delay. Please proceed.

Ms. MACFARLANE. I think there are several things we can do to improve the situation in both the short term and the long term.

In the short term, I think probably the most immediate step that would help what I consider really a crisis in our courts right now, is to at least coordinate what we have already got. That is what we are trying to do in Los Angeles. It is not easy taking systems that ordinarily rarely even talk to each other and people in professions that rarely interact, and trying to get them to prevent the traditional trauma to children by putting out more of themselves to overcome their turf and their feelings of priorities of where they belong. I think we have to admit that we are running sort of a MASH operation right now out in the field, and we think we know what we are doing, but we are not sure. We are in a very experimental stage. The *McMartin* case itself keeps pointing out to us that the legal thin ice we walk on, all the issues around videotapes that we have made, who has the right to them, do they have the right of possession versus the right of access, who do they belong

to, who can we make copies of, how are they used in court, can they be used as some kind of evidence, can they be used corroboratively, can they be used instead of children, to back up children, et cetera. It is a whole new world with a lot of the things we are trying. It takes sticking your neck out to a certain degree. I think that it is worth it when you consider what you might be sparing the children of.

Second, I think we need to centralize our efforts around centers which have the capability and the facility to handle these cases—and I mean not just the kinds of psychological evaluations that we do, but also the medical evaluations in one place, if possible, so that they do not have to get trucked around town to different sites, as well as court preparation. There is much you can do to overcome the fears of children in court. I truly believe that. But one thing I know about doing it, because it is part of what I do as a living, is it takes a lot of time; it takes a lot of extra effort of bringing children to court and helping them understand how that system works, and tracking them, hand-carrying them through this system is what is needed, from the time of the discovery of the abuse to the time of adjudication. That is not done almost anyplace in this country. And the only places I know that it is done is where there are specialized centers for which there is extremely little funding.

In the longer term, I think we need better research and better training in terms of what are the best ways to elicit information from children that is valid and reliable; how far can leading questions go; what kind of effects on children and cases do leading questions have, and are they necessary. I believe they are, but they are antithetical to the basic orientation of our criminal justice system.

The court reforms that Ms. Rubin has talked about, I think, come in many ways from helping trying to see the world from children's eyes, and I think that we have got to try to see the court world from children's eyes. If we do, I think we will find oftentimes that they take on the role of the child in the fairy tale about the emperor's new clothes, that if we listen to them, we find out that they are the ones who are seeing the emperor, or the system, as it really is.

I think that the scales are heavily tilted against children right now. We have one of the strongest defense bars there is in this country, and we have very little voice for children. Child perpetrators that I work with, some as young as 7 and 8 years old, who have molested other children, are far better protected in our system than the 7- or 8-year-olds that I work with who have been molested. I am not in favor of denying anyone a fair trial. I think we need to examine what is fair.

If we are interested in finding the truth in these cases, which I think that all of us are, we must first set up an environment in which truth is able to come out. I do not think we have that right now. It is in the details and it is in the context of the descriptions that children give that the truth, I believe, can be deciphered. And if we set up an environment where silence and fear—that is conducive to silence and fear—that is what we will get from children. And I do not think that we can ever get justice in these cases without the ability to bring forth the truth, and I think we are obligated to do everything we can, if we are going to put children through

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this, to at least be able to say that we think that we have gone through it for the purpose of eliciting the truth.

We will never be able to prevent the abuse perpetrated by child molesters, ultimately. We can to some extent, but we will never prevent it totally. We should be at least able to prevent the abuse perpetrated subsequently by the system.

I think that what is in the best interest of children in court is also in the best interest of justice in these cases, because it allows children to tell their stories and allows us to be able to hear it.

As I said, there are no simple answers. And right now, I think we must first admit that what we are doing is not working very well. It is not even a matter of, as you were saying earlier, are we willing to let child molesters go—we let them go all the time. It is not working, and I think that additionally, it is causing subsequent harm, and that is what I think we must work to prevent.

Thank you.

Senator SPECTER. Thank you very much for your testimony, Ms. MacFarlane.

We were discussing one point that I think there was an interruption on, about children, somewhat older than preschool children, as to credibility, based on your experience. And you had testified that you thought that, as to preschool children, what you had heard, you believed, generally, because the children would not know what to make up.

At what point in the age span, if at all, does the credibility issue become any weaker, where children have had an opportunity to know more, and some experience-based credibility?

Ms. MACFARLANE. Well, I do not think you can really put it on age, because children develop so differently, and you can have incredibly mature, experienced 6-year-olds and incredibly immature 14-year-olds. So that is very difficult. What you do find is that as the child's, perhaps, ability to describe things that they may have knowledge of other than firsthand experience——

Senator SPECTER. Well, would you have any insights or guidelines to fact finders as to what to look for in evaluating the credibility of a child?

Ms. MACFARLANE. Yes; in fact, I am working on that in a book with five people right now, and I think it is something we need a lot of. It is not something that is easy to say in a few words.

I think that it takes very thorough evaluation. You need to look at possible motives, like you do in any kind of a case or an evaluation; you have to look at other kinds of motives, what the child's feelings are about the person they are accusing, how they react to your questions, and what they are able to describe.

Really, it is the level of credibility—the level of credibility is often provided by the level of detail, no matter what the age of the child.

Senator SPECTER. Let me move to another subject, if I may. The buzzers just rang for a vote. Whatever we do here is subject to a lot of interruptions, I regret to say. Let me raise one final question with the two of you, if I may, and that is your judgment as to the issue of televising cases involving juvenile victims on sexual molestation.

What do you think, Ms. Rubin?

Ms. RUBIN. Well, as you probably know, that is an issue that we will be facing in Los Angeles.

Senator SPECTER. Yes, I do know.

Ms. RUBIN. I have not yet seen the proposal that we are anticipating. We are concerned, and as a result of our concern, are requesting the use of closed-circuit television. And on the one hand, it seems to me that if we are concerned about psychological trauma and harm to children and want to use closed-circuit television, then that argument would seem to prevail against the use of live coverage by a national network.

On the other hand, we do recognize the public's need to know and the interest of the public in this kind of a case: In terms of making a comment as to what our position is, I really cannot make an official comment until I see what the request is and what are the results of our request for closed—circuit television.

Senator SPECTER. If you work it out on closed-circuit television, would you think then that there could be an accommodation of the interests of the child-victim so that television would be appropriate?

Ms. RUBIN. I think that in that situation, television would be much more appropriate, in terms of having a vehicle whereby to protect the children, yes.

Senator SPECTER. What is your sense on that, Ms. MacFarlane?

Ms. MACFARLANE. I am as concerned about the parents as I am about the children in this case. Their privacy has been ruptured by this situation. And I think that while we may solve some of it by protecting children, the parents will be testifying as well in this case, and the medical people will be testifying as to the identities of the children, and so will we. I do not see how this case can be televised live and protect these children and families.

As many incest victims will tell you, "Big deal—they kept my name out of the newspaper, but they put in my parents' and our address." That is just as bad.

Senator SPECTER. Do you think it is not possible, with some delays on television, to delete any inadvertent reference to names or addresses?

Ms. MacFarlane Well, all I can say is I sat in for almost all of the grand jury testimony on this case, and I do not see how it would be possible, because there are constant references to names and identifying information. I do not see how you could do it.

Senator SPECTER. And to the extent that there is an identification, you think that the rights of the victim and the families would outweigh any public benefit in having them televised?

Ms. MACFARLANE. Well, all I can say is I sat in for almost all of report what happened in the courtroom that night on television without having to expose the people whose lives have already been shattered by this experience.

Senator SPECTER. Ladies, I thank you very much. There is so much more that I would like to cover, but we have so many additional witnesses. We very much appreciate your coming, and the testimony has been very helpful.

Thank you.

Ms. RUBIN. Thank you very much.

Ms. MACFARLANE. Thank you.

Senator SPECTER. I would like now to call Deborah Smith. I have to be careful now as to whose names I use and whose names I do not use. Mrs. Smith's 4-year-old daughter was the second child at the McMartin School to reveal molestation. Her daughter was interviewed several times by police officers and psychologists who were not extensively trained in child sex abuse cases, and Mrs. Smith will explain how her child felt more at ease and responded better when Ms. MacFarlane, a trained therapist, became involved in the case.

Our request in Mrs. Smith's situation is that she not be photographed with her face showing, and obviously, that is a request which we are relaying to the media coverage. The Senate proceedings are customarily public, so that it is not a matter that the Senate can order, or that I as chairman can direct, but can relay the request, and I think, judging from the affirmative nods, that it will be respected.

Mrs. Smith, we welcome you here. We very much appreciate your coming and look forward to your testimony.

STATEMENT OF MRS. DEBORAH SMITH, LOS ANGELES, CA

Mrs. SMITH. Thank you.

I am here today as a parent, to offer a personal account in the hope that it will enable you to at least consider a better alternative for the protection of our children within a judicial system designed expressly for adults.

Approximately 8 months ago, on the afternoon of Friday, September 9, 1983, we received a letter from the Manhattan Beach Police Department, notifying us that our daughter's preschool teacher had been arrested earlier that week on charges of child molestation. The letter also requested that we question our child in order to find out if she had either witnessed anything or been a victim herself of sexual abuse. Later on that day, I did so, and she willingly responded with details of her abuse. I knew then that she was telling the truth. I believed her.

Monday morning, I went to the police station to file a report. Subsequently, our 4-year-old daughter was called in for questioning on five separate occasions, lasting upward of 1 hour in length, preceded usually by another hour of waiting for the female detective.

I look back on those first days as a time when I was in a kind of shock and functioning as such. The people we had entrusted with the most precious thing in our lives, our daughter, had turned out to be totally untrustworthy. Therefore, the trust you might have had in your own judgment is then shattered.

We felt that the more she was questioned, the more she was beginning to withdraw or avoid the question. She showed signs of increased stress, but while at home or in our car, she would relate the detailed accounts of 2 years of repeated sexual, physical, and psychological abuse and demoralizing intimidation, without any provocation on our part.

In the course of our trips to the police station, our daughter asked if she was going to be put in jail, too. Unfortunately, all that questioning reinforced for our child what her molesters had told her would happen if she told the secrets—that is, that no one

would believe her and that it would be her fault. none of which is conducive to further disclosure.

I called the child psychologist during that first week, only to be informed that if she was willing to talk with the police, he did not see any harm in her continued questioning. He was not, however, an expert on the sexually abused child, which we know now to be a very specialized field. His advice, for all its good intentions, was wrong.

Many people outside this experience seem to feel that their children would tell them, no matter what. At first, while reading our letter of notification, I was convinced of the same thing. Our daughter is an outgoing, verbal, loving child. But consider, if you will, from the child's viewpoint what it must have been like to be threatened that your mother, the very center of a young child's life, would be killed.

Senator SPECTER. Was that threat given to your child during the course of the sexual abuse?

Mrs. SMITH. Yes, repeatedly.

From the age of 2½ to 4½, my daughter, in addition to the burden of what amounted to a double life, simultaneously felt responsible for my very existence.

Senator SPECTER. The sexual abuse allegedly started when she was 2½?

Mrs. SMITH. Yes.

Senator SPECTER. And it extended over a period of 1½ years?

Mrs. SMITH. Almost 2 years.

Senator SPECTER. Almost 2 years that she was threatened that if she told about what had happened, that you, her mother, would be killed?

Mrs. SMITH. Yes.

While it is true that we had no idea our child was being sexually abused, we did have other signs. Approximately 8 or 9 months before receiving any notification, I had taken our daughter to our pediatrician for treatment of bronchitis, and informed him at that time that I had also noticed considerable redness and swelling in her genital area. He chose not to examine her at that time, but instead told me she was most likely "wiping wrong." She was not. The problem continued, and I took her along with me for the next office visit, which was for a routine exam of our son, who was at that time an infant. The doctor again chose not to examine her, but instead told me to cut out all bubble baths and to have her wear only cotton underwear. We did that and more, changing soaps, detergents, toilet paper and making——

Senator SPECTER. And two doctors on your request declined to take a look at the complaints?

Mrs. SMITH. It was the same doctor at that time.

Still the problem worsened. It was obvious she was experiencing pain and discomfort, causing a great deal of anxiety for all of us, especially her. Shortly thereafter, I noticed that she had a vaginal discharge, and at that point, I asked my stepfather, a general practitioner, to examine her. He did so and diagnosed her as having vaginitis. He told me it was rare in children of her age and to contact her pediatrician and tell him so. I did. In our phone conversation, he told me to administer antibiotic cream twice a day. I did

so, amidst her screams of protest. The irritation was minimized somewhat, so I continued this treatment for approximately 2 months until we received the letter of notification from the police department——

Senator SPECTER. Mrs. Smith, I am sorry to interrupt you, but I have 4 minutes left to make the vote, and I shall be back momentarily and we will continue. Thank you.

[Short recess.]

Senator SPECTER. I am sorry, Mrs. Smith, please resume.

Mrs. SMITH. She subsequently went through two more vaginal exams and cultures and a blood test for VD, after we received notification. At this point, I was in contact with UCLA and then, shortly after, Kee MacFarlane became aware and involved in this case. Our daughter was then evaluated and videotaped at Children's Institute International with Kee, and we were relieved that, at long last, we were in capable hands. We could begin to trust someone again, because we knew that her main concern was for our child's well-being and ours. Finally, we had the help for our daughter and ourselves that we so desperately needed.

Our little girl left Kee that day feeling happier than we had seen her in months, with less of a burden than before.

She is still very much afraid of her molesters and sometimes feels the anger of betrayal and low self-esteem that accompanies her victimization.

This case is currently before the court, and it is our sincere hope for our child and the other children that closed-circuit may be used as an alternative to a courtroom filled with adult strangers—and, worst of all, their molesters. With the closed circuit put into effect, our children would still be cross-examined by as many as seven defense attorneys, and I am not at all sure that my child could withstand even that. Whereas, if she has to face her abusers, I am almost positive that she would be too terrified to speak. As a parent, I am not at all sure I would be willing to take that risk because however badly we want these people locked away from society and other children, our first and foremost concern is for our daughter and what is best for her. She has already been and is still going through so much more anguish than she should have ever had to experience in her formative years.

In closing, I would just like to say that as parents, we realistically know that the crimes of child sexual abuse have always been within our society and are likely to go on long after this case is over. But at the same time, we cling to the hope that these crimes will no longer remain the easiest to commit. We must begin to believe and protect our children.

Thank you.

Senator SPECTER. Thank you very much, Mrs. Smith.

How is your daughter now? How is she responding, how is she behaving; what is the impact, as best you can tell, on this abuse situation?

Mrs. SMITH. It seems to come in waves. There are times when she seems to be doing very well. We are all trying to maintain as much normalcy as possible. But when she has had a particularly good day at therapy, where she has worked out a lot of things or is

remembering things, she tends to maybe have a nightmare or bed-wetting; anxiety over my safety is very much still a factor.

Senator SPECTER. What therapy is she undergoing?

Mrs. SMITH. Weekly therapy with the counselor who is skilled in child sexual abuse.

Senator SPECTER. You do not have to face the choice, as I understand the facts of this particular case, as to whether the alleged molester will be brought to trial, or whether your daughter would have to testify. But what would your feeling be if your daughter's testimony were the only way that a molester could be prosecuted, convicted, and jailed? Would you seek to have her not testify under those circumstances, because of the potential damage which you have described that you fear for your own child?

Mrs. SMITH. In the beginning, we were the second to come forward, and at that time, it looked as if that would be very likely to be the case. But that was also very early on, when she had not told her story so many, many times and gone through so much. She does believe these people to have magical powers, and as much as I try to counterbalance that with what I can tell her in a positive way, that they are in jail and that they cannot hurt us, or will not, and that he has no magical powers, the kind of impact that they had with her was mixed with terror, and it made much more of an impact than the positive kind of comforting I can give her. It will take a long time. So I am not at all sure; I am not sure. I hope closed circuit is put into effect. Otherwise, we will have to make that decision.

Senator SPECTER. But you just do not know how you would decide it if you had to make that decision now as to whether you would want her not to testify, if the absence of her testimony meant that the molester would get away scott-free.

Mrs. SMITH. I would hate to see that happen, but my main concern is for her.

Senator SPECTER. What is your feeling on the issue of having the proceedings televised? The considerations are that if there is live television coverage, there will be extensive understanding by people about the problems of sexual abuse of children, contrasted with the issue of privacy of the victims and the families. There are efforts made to shield the identities, but it is not foolproof. So what is your own sense as to that?

Mrs. SMITH. I feel that they could really report what goes on in the courtroom, and I do not really see that there is a need for them to photograph it; I really do not. I would feel very unsure, even if they did promise not to disclose our names and addresses or our children's faces.

On the closed circuit, we would have a better opportunity to have some more control over that, though.

Senator SPECTER. Senator Hawkins?

Senator HAWKINS. In the schoolroom where your child attended, were the other children aware of how many children were involved in this trial, to your knowledge? Did the children in school know that a certain percentage of them were involved in the trial and others were not?

Mrs. SMITH. Yes.

Senator HAWKINS. Did that make a difference?

Mrs. SMITH. Yes, it would—do you mean with the defendants?

Senator HAWKINS. Yes.

Mrs. SMITH. Yes, yes, it would.

Senator HAWKINS. Do you feel that it would harm your child if the prosecution wins this case, or it will be helpful to your child if the prosecution wins?

Mrs. SMITH. I think it will be helpful to her, that something has been done. And I think if she is able to testify in some way, it will help her to know that what she said was believed, and that these people cannot get away with this.

Senator HAWKINS. And that there is a justice in the system for children.

Mrs. SMITH. Yes, and that there is fairness.

Senator HAWKINS. Thank you.

Senator SPECTER. Thank you very much, Mrs. Smith. We very much appreciate your coming.

Mrs. SMITH. Thank you.

Senator SPECTER. The next witness, whom we are calling by an assumed name because of the effort to maintain her anonymity, also wishes not to be photographed, and again, the request is made by the subcommittee, relaying that request to the media, and again stating that we do not have the power to order anybody not to photograph or televise in a public hearing, but I believe it will be honored.

I would like to call at this time a young woman we will refer to as "Melissa Jones" and her mother. The mother and the child are being accompanied by the therapist who is with them at the present time.

Let me start with Melissa's mother and ask you to describe briefly what happened to your daughter.

STATEMENT OF MELISSA JONES AND HER MOTHER, MS. JONES FROM MARYLAND

Mrs. JONES. My daughter was raped by a juvenile, who was a very good, close friend of ours.

Senator SPECTER. How close a friend was the juvenile?

Mrs. JONES. I had known him and his family for over 4 years. We had gone out with his parents, and his parents had come up to our home, and we had socialized quite a bit with them.

Senator SPECTER. And how old was the person charged with the rape?

Mrs. JONES. Thirteen.

Senator SPECTER. And how old was your daughter, Melissa, at that time?

Mrs. JONES. Seven.

Senator SPECTER. And how did you find out about the sexual incident?

Mrs. JONES. From my son's girlfriend at the time.

Senator SPECTER. And what did they say at that time?

Mrs. JONES. She said to me, "Ask your daughter what this boy has done to her."

I said, "What do you mean? I do not understand."

She turned around and repeated the same thing to me, and I was in a complete state of shock. I could not believe that boy had done that.

Senator SPECTER. And who decided to prosecute?

Mrs. JONES. The police officer went to the State's attorney to find out if they were going to prosecute the boy or not, with all the information they had gotten together.

Senator SPECTER. And the defendant was prosecuted as a juvenile?

Mrs. JONES. Yes, he was.

Senator SPECTER. And how was Melissa prepared to testify?

Mrs. JONES. Her therapist talked with her about going into the courtroom. She was also taken into the courtroom by Victim Assistance.

Senator SPECTER. And how old is Melissa at the present time?

Mrs. JONES. She is 9.

Senator SPECTER. Was Melissa's competency as a witness challenged?

Mrs. JONES. No.

Senator SPECTER. After Melissa testified, as I understand it, a mistrial was declared, because the judge had interviewed a witness in his chambers without the presence of the defendant's lawyer; is that your understanding?

Mrs. JONES. No. The lawyer was in there. The boy himself was not in the chambers.

Senator SPECTER. So it was the absence of the defendant which caused the mistrial to be declared?

Mrs. JONES. Yes, sir.

Senator SPECTER. And is it your expectation that Melissa will have to go to court to testify again?

Mrs. JONES. Yes. They told me she has to; yes.

Senator SPECTER. And what has happened to the defendant?

Mrs. JONES. He is walking the street, scot-free. He is not in therapy, and there was no control over him when we were living there, and I am sure there is none now.

Senator SPECTER. Are you able to avoid any contact between that defendant and your daughter?

Mrs. JONES. We had to move from where we were living to a new area so that we would not have that.

Senator SPECTER. And Melissa, if we may ask a question or two of you—we will not discuss the incident with you.

How old are you?

MELISSA. I am 9 years old.

Senator SPECTER. Who told you that you would have to testify at the trial?

MELISSA. My therapist, Debby.

Senator SPECTER. And how old were you when you testified at the trial?

MELISSA. Eight.

Senator SPECTER. And what was it like, testifying at the trial? Hard?

MELISSA. Yes.

Senator SPECTER. Unpleasant?

MELISSA. It was unpleasant sitting in front of the boy.

Senator SPECTER. You would have preferred to have testified without seeing the defendant?

MELISSA. Yes.

Senator SPECTER. And tell us if you can why you found it unpleasant to sit there in front of the boy.

MELISSA. I found it unpleasant sitting in front of the boy because Mark, the lawyer, told me I had to point to him, and I really did not want to be in front of him at that time.

Senator SPECTER. Did you feel frightened by being in his presence?

MELISSA. No, because I knew that my parents were there, and I was not frightened at all.

Senator SPECTER. You were not frightened at all?

MELISSA. No.

Senator SPECTER. But you had to make an identification of him as the person who did the act?

MELISSA. Yes.

Senator SPECTER. And did you point him out?

MELISSA. Yes.

Senator SPECTER. But you did not feel intimidated or frightened or uneasy being in his presence for that reason?

MELISSA. Yes.

Senator SPECTER. You did?

MELISSA. Yes.

Senator SPECTER. How do you feel about being required to testify again?

[Pause.]

Mrs. JONES. She did not understand the question.

Senator SPECTER. How do you feel about being required to go to court again? You know that there was a mistrial declared, which means that there has to be a new trial for the defendant?

MELISSA. Yes.

Senator SPECTER. And how do you feel about being required to go back into a courtroom and to tell the incident again?

MELISSA. I really do not mind, because I would like him put away.

Senator SPECTER. When you say you would like him "put away," what do you think ought to happen to him, based on your own sense of justice, what do you think should be done to him for what he has done to you, as you see it?

MELISSA. I think he should be put away for life for raping a 7-year-old girl.

Senator SPECTER. During the course of the proceedings, how many times have you been called upon to recount what happened to you in this incident? Did you have to tell the police about it, did you have to tell other people about it?

MELISSA. I had to tell the police in my own words.

Senator SPECTER. Would it make you uncomfortable if his trial were to be televised, if you were appearing before a television camera while he was being tried?

[Pause.]

Senator SPECTER. You have not thought about that question, I know, but——

Mrs. JONES. She hasn't.

Senator SPECTER. Well, those are the questions which we had been prepared to ask you, and we will not ask you many others. I know it is not easy for you to come forward, but what you have to say is helpful to the subcommittee and may be of substantial aid to us in helping out other young children.

Senator Hawkins?

Senator HAWKINS. You are a beautiful little girl. Now, tell me, did you tell your mother first, after she had talked to you about it; then did you tell her all about it?

MELISSA. My father was present at the time, so I told my mother and father, both.

Senator HAWKINS. At the same time. And then you told the police; you told Senator Specter you had to tell it to the police, right?

MELISSA. Yes. I had to write down in my own words how I felt.

Senator HAWKINS. Did you then have to tell it again to your lawyer?

MELISSA. Yes.

Senator HAWKINS. And then again to the people in the courtroom—how many people were in the courtroom when you were there? As many as are here today?

MELISSA. No; my mother, my father, my grandfather, and my therapist, and my lawyer, and the defendant's lawyer, and the boy's mother and father, and him.

Senator HAWKINS. That's all?

MELISSA. Yes.

Senator HAWKINS. Did you sit in the witness chair by yourself?

MELISSA. Yes.

Senator HAWKINS. It was a pretty big place, wasn't it?

MELISSA. Yes.

Senator HAWKINS. Do you think any of your friends know about it?

MELISSA. No.

Senator HAWKINS. Because you moved away?

MELISSA. Yes.

Senator HAWKINS. Does your former teacher know about it?

MELISSA. I do not think so.

Senator HAWKINS. How about your present teacher?

MELISSA. No.

Senator HAWKINS. Your new teacher does not know?

MELISSA. No.

Senator HAWKINS. Do you and your family have chats about how to prevent this from happening in the future?

MELISSA. Yes.

Senator HAWKINS. I think you are a brave young girl to come and share this with us. My questions have been asked by others. We want to compliment you for being such a competent witness and having a vocabulary so far beyond your years.

We wish you good luck in changing the doll's name. If you need a lawyer, we have a bunch of them around here. OK?

MELISSA. Yes; and I would also like to have the laws changed for all the other children, and I would like you to help all the other children that are being raped today.

Senator HAWKINS. That is why we are here.

Thank you.

Senator SPECTER. One final question. Do you think you are in a position, as best you can tell, to pretty much put it all behind you when it is all over?

MELISSA. Yes.

Senator SPECTER. You think you can, with help from your therapist and help from your family.

MELISSA. Yes.

Senator SPECTER. Well, we certainly wish you the best of luck and thank you for coming forward.

MELISSA. Thank you.

Senator SPECTER. I would like to call now Mr. Bill Arnold.

STATEMENT OF BILL ARNOLD, CROFTON, MD, ACCOMPANIED BY MRS. ARNOLD

Mr. ARNOLD. My wife and I thank you for this opportunity to appear before you to present a brief, 5-minute summary of our family's personal court involvement in a matter of child sexual abuse. We felt compelled to come forward.

We are residents of the State of Maryland. My wife has two daughters, presently aged 8½ and 10, by her former husband, who also resides within Maryland.

Senator SPECTER. Let me just interrupt you for 1 second.

Mr. ARNOLD. Sure.

Senator SPECTER. As I understand it, you have not requested not to be photographed, but I just want to be sure that you have no objection.

Mr. ARNOLD. That is correct. We would prefer that, that is correct.

Senator SPECTER. You would prefer not to be photographed?

Mr. ARNOLD. That is correct. We inadvertently put our name in, and I apologize.

Senator SPECTER. All right. We will then relay that to the media.

Mr. ARNOLD. Thank you.

Contrary to the popular myths that child molesters are usually strangers or that incest is most prevalent in poor and minority families, we discovered that our youngest daughter was sexually molested by her natural father during his weekly visitations for 4 years, from the time she was 2½ until she was 6½ years old. Naturally, we immediately denied any further visitation, against the advice of former counsel.

This committee told the two mothers who testified here at the last meeting:

> I suggest you persevere in bringing evidence to the decisionmakers. Evidence is the decisive factor in our judicial process. If you are discouraged by attorneys saying the evidence will not be heard, press on. You have the right to manage your own legal affairs.

I come before this committee to respectfully submit that while that statement might be true from a philosophical standpoint, it is the exception rather than the rule when it concerns the sexual abuse of children.

After a 2-year involvement with the system, and more particularly the last 18 months within the judicial process, and after incur-

ring over $33,000 in legal fees and court costs, I can honestly say that the system does not work to protect our children.

The molestation was reported, investigated, and concluded by both the child protective services intake worker and the police department investigator that the abuse occurred, even though the father denied any wrongdoing.

However, the State's attorney's office invoked their discretion, and decided not to prosecute because of insufficient evidence—no confession, no witness, other than the older daughter, who witnessed several abuses—and instead referred the case back to us as a visitation matter. The assistant State's attorney sent a letter to the department of social services which stated, and I quote,

> I believe that this is a serious situation, but one that cannot be handled through criminal procedures because of lack of evidence. Visitation would seem to be an appropriate tool for enforcing counseling and monitoring of the father.

It is interesting to note that in our county, of 88 cases of reported sexual abuse, the State's attorney's office only prosecuted 7.

The department of social services caseworker filed a report recommending visitation because, and I quote,

> He is not being criminally prosecuted due to lack of evidence. The allegations go no further than fondling. No allegations of penetration or attempt at penetration have been made.

Apparently, the caseworker felt fondling was OK. She further states in her report:

> The State's attorney in his letter addressed to the intake worker did not indicate that visitation should not occur, but saw monitored visitation as a necessity. This worker essentially holds the same opinion.

Shortly thereafter, the department of social services closed the case. The father then petitioned the court for resumption of his visitation rights.

Since that time, our family has endured, emotionally and financially, a total of eight hearings within the civil court, and finally, an appeal to our State's court of special appeals.

During the civil hearings, two nationally recognized experts who specialize in child sexual abuse, including our daughter's therapist, Linda Blick, with the Chesapeake Institute, testified that after the evaluation and meeting with both the father and the girls, in their professional opinion, the father did sexually abuse his daughter. Also, Dr. Lourie, a noted child sexual abuse psychologist who also evaluated our daughters and the various reports and psychological evaluations, testified that in his professional opinion, the father had molested his daughter. And the police department investigator, the intake worker, and even the caseworker all gave testimony that in their professional opinion, the sexual abuse occurred. Further, eventually our counsel was successful in persuading the court to allow the testimony of the children, as well as another relative who, when hearing of the girl's abuse, came forward to reveal the details of her being sexually abused by the father during the years she was 9 through 12.

In light of the overwhelming reports and testimony, but with the total denials of the father, the trial court judge stated, and I quote,

> He is a natural father. They are his children as well as they are my wife's children. However, I am going to caution him that he is going to be under surveillance.

Now, I am going to tell you that if I find that you abuse these children in any way, you are going to kiss your right way. Do you understand that? And I have reason to believe that you will not do that. And, um, I do not feel that at least within this 90-day period that I am allowing this temporary visitation that any harm would come to those children, unless it was proven to me that he has committed these acts, I am not going to terminate him period, until he demonstrates otherwise.

And he summarizes by stating:

I told you when I got through that nobody would be happy. I mean, you just cannot satisfy everybody. But I have got to look out for the interests of those children. To foreclose—the father—from ever seeing those children would be the worst thing I could ever possibly do.

Throughout the hearings, the judge remarked repeatedly:

The State's attorney never prosecuted him. He was never prosecuted. The father said he did not do it. You do not want him to admit to something he said he did not do. What I have here is circumstantial evidence * * * no confirmation.

The judge finalized the hearings with:

I have now exhausted everything I have had in the way of testimony. I cannot find as a matter of fact that these children have been abused. And I don't so find. And therefore, I am going to order visitation.

From those hearings, we appealed to the court of special appeals. The court stayed the trial court's order and filed the opinion finding that the court erred in using the wrong standard of proof and reversed and remanded the case for proceedings consistent with the opinion and to take another look.

While many who have monitored this case have stated that our system of justice does work—after an appeal and over $33,000 expense—at this juncture, we are again faced with a new trial and expense, and it is doubtful as to whether the judge will decide any differently—at least, that is the indication we received from our recent preliminary proceeding.

We appear here today to express our concern about the legal and judiciary's misperception of a child's credibility. The majority of experts agree that children rarely lie about sexual abuse. In fact, statistics reveal that only 2 to 5 percent of reported sexual abuse cases are fabrications or embellishment of the abuse. And with younger children, the percentages are even less. Yet investigators, prosecutors, attorneys, and even guardian ad litems and justices often fail to protect the child or other innocent children because they themselves question the child's veracity, even when faced with overwhelming evidence.

Through our counsel, we requested the court to interview the girls at two of the hearings. But in the court's chambers the judge, on both requests, stated that it was within his discretion and he did not care to hear from them, that their testimony was included in the reports.

Finally, after finding "no abuse" on the second hearing, our counsel petitioned the court for reconsideration or appeal and the testimony of the children to be admitted, as well as my wife's relative, who was an adult, at that hearing, a list of questions were prepared by counsel and the children's therapist that were to be asked by the court. The children by then had been involved in weekly therapy sessions for almost 6 months and were prepared for court testimony. As a matter of fact, the youngest daughter had

wanted to tell the judge all about what had happened to her "so he will believe me and know that my father is lying."

Senator SPECTER. How old are the children?

Mr. ARNOLD. Now, they are 8½ and 10. It would have been 1 year ago.

The judge remarked, "I am not going through all these questions, I can tell you that right now." The court was cleared of everyone except both counsel, and the children brought in one at a time.

Senator SPECTER. When the appellate court reversed and sent it back, did they admonish the judge for not having heard testimony from the children?

Mr. ARNOLD. The children's testimony was entered prior to the appeal. We ultimately got, after eight hearings——

Senator SPECTER. So he finally did hear the testimony of the children?

Mr. ARNOLD. Yes, but that was before we went to the appeals. The appeal was the final result, after seven hearings.

Senator SPECTER. You say the appellate court reversed for applying the wrong standard. Do you know what standard he applied?

Mr. ARNOLD. He was using throughout "beyond a reasonable doubt," and the court said that——

Senator SPECTER. He was using a criminal law standard?

Mr. ARNOLD. That is correct. And he was also justifying that on the basis that the State's attorney's office had never prosecuted him. Whereas the State's attorney, I might add, had told us that it was easier to prosecute in the civil court, and that he was not going to do so, because it was easier because of standard of proof.

Of the 15 questions involving the abuse suggested by counsel to be asked of the older child, none was asked by the judge. Of the 13 questions involving the abuse to be asked of the younger daughter, only 8 were asked by the judge.

The youngest daughter testified that:

"Her father * * * touched me * * * where I didn't like—in the private parts— * * * he said if we tell anybody, he'd get us back. And he said not to tell anybody that he locks my sister in the room and all that."

The court said, "Do you ever examine your private area?"

"Yes. That is why he locked my sister in the room."

The court, "Why is that?"

" 'Cause I don't think he wanted her to see what was happening."

The court, "When did this all take place?"

"During the summertime."

The court, "This last summer, last summer?"

"I'm not sure. When I was 5 and 4."

The court, "Would you like to see your father if somebody else was present?"

"Uh uhh."

The court, "And why not?"

" 'Cause I don't feel safe."

The court, "What do you think he will do to you?"

"He'll probably punish us and all that and all that . . . because he'll probably punish us because we told everybody."

The court, "Is that the greatest fear?"

"Uh uhh. He'll probably do it again and never take us back to our mom or something. I don't want to see him any more."

The court, "You don't want to see him any more, period?"

"Uh uhh."

The court, "And why not? If somebody is present, he can't hurt you."

"I know, but I just don't want to see him any more."

The court, "Is that because your mother told you that you shouldn't?"

"Uh uhh. It is my feelings that I don't want to see him any more."

The court, "Did your mother tell you to say anything?"
"Uh uhh. Except she told me to say the truth."
The court, "Tell me the truth. Do you ever want to see your father?"
"Um, um umm."
The court, "Never want to see him. OK. She may step down. You can tell everybody to come on back in."

Mr. ARNOLD. And the judge then summarizes the interviews as follows:

"I have interviewed both children. The older child testified that her father drinks, throws things at her, he bothers her, he lies to her, and she is not too keen on seeing her father. The younger child states that she is not safe, that he locked her sister in a room for a long time at one time, and he touched her private parts at one time, that he walks around the house with his underwear and t-shirt, and that he did examine her potty area. And she did not want to see him, and the last time these things happened was when she was either five years or four years of age. And she is afraid that if she went with her father, he would punish her, and she does not want to see him anymore.

"So that is a summation of my interview. With that, I would be glad to hear anything else you have."

At the final hearing, some three hearings after the children's testimony, the court in finding no abuse and ordering visitation, stated throughout,

"Oh, I know this case like a book. You do not have to ask me to recall. You know I have been over it so many times. I was not here to judge whether he committed that sexual abuse act. If he did do that act, is he forever deprived of seeing his children—no, I mean, who did the indicating. They say it was—they, the investigators, reached the conclusion that it was—who did the indicating?"

Counsel, "Well, first they interviewed the children. As I recall the testimony, they went through some play-acting with some dolls, and some other things that they do."

Counsel, "The court interviewed the children. They both gave testimony supporting it. The court heard from the children. Mrs. Arnold's sister testified. The question somewhat then becomes mildly academic, and that is whether or not the police, the social services and the experts are not telling the truth, or the father is not telling the truth."

The court, "Somebody is not telling the truth. And of course, some of it all rides together. If you take it together, you could come up with the same—you know, you could come up with whatever they, the children, say, based upon the set of facts."

It is obvious that the court was not convinced that the children or the many experts were credible witnesses.

According to Dr. Gene Abel, director of the Sexual Behavior Clinic at the New York State Psychiatric Institute, "The majority of men who commit incest do so because they are genuinely aroused by children, not because of family dynamics. They are child molesters who stay at home."

Further, Dr. Abel's study of 238 sex offenders showed that each child molester was responsible for abusing an average of 68.3 young victims.

Although the State's attorney sent a letter to the court over 1 year ago, stating, "Please be aware that as a result of a recent reevaluation, combined with discussions with many people regarding the merits of this case, a decision has been made to actively pursue it from a criminal standpoint."

As of this date, no charges have been brought. At oral argument before the court of special appeals, the justices questioned why charges were not brought. The father has moved to a different home within a different county, and his home is located directly

adjacent to a children's summer camp. And society wonders why child molestation is on the rise.

We request that this committee explore the various avenues available to the Federal Government to insure the protection of all children. We cannot emphasize enough the need for this Nation to adequately train all professionals involved in the investigation and prosecution of child abuse and child sexual abuse, more particularly judges, prosecutors, attorneys, and social workers.

This concludes our presentation. Again, thank you for your indulgence.

Senator SPECTER. Thank you very much for your testimony.

[The following was received for the record:]

38-298 O - 85 - 8

EXTRACTS FROM

PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME

FINAL REPORT DECEMBER 1982

President Reagan's Task Force on Victims of Crime reported,

"Many prosecutors fail to treat child molestation cases with the seriousness they deserve. The profound trauma inflicted on young victims and the after effects that may mar them for life are simply immeasureable. Those who impose this activity on children are dangerous and will continue to be so.....those who engage in sex with children do so by choice, not as the uncontrollable by-product of some disease. Because their conduct is purposeful and there is little motivation for change, treatment is usually unsuccessful. The most recent data suggest that this conduct will continue throughout the molester's life and will escalate as he ages. These individuals represent a continuing threat to children....molesters have a better chance than most criminals of escapin detection and successful prosecution...When prosecutors do get such cases, they may be hesitant to charge or anxious to plea bargain because these cases are often difficult to try. The prosecutor will often seize on parental reticence as an excuse not to proceed with the case instead of working with the parents to determine what course is best for the child and for the protection of future victims. Judges should recogniz the profound impact that sexual molestation has on victims....Perhaps no crime is more misunderstood and less adequately treated by the justice system than the sexual molestation of children. Everyone who confronts these cases finds them difficult. There is almost a need to fin that the conduct is the result of mistake, misinterpretation, or psychological aberration. Yet denial only exacerbates a problem that has r reached almost epidemic proportions in this country. Thousands of innocen children every year pay the price for this denial. Children who are victi ized this way, even if they are not physically injured, may be harmed severely, perhaps more severely than any other victim. The effects on the are profound....The best psychiatric findings indicate that these defenda are responsible for their conduct, and that treatment in this area is rar successful. Those who engage in sex with children do so because they choo to, and they will continue to make that choice as long as they are free to do so with impunity. Those who prey on children must be sequestered from them."

WARREN B. DUCKETT, JR
STATE'S ATTORNEY

FRANK R. WEATHERSBEE
GERALD K. ANDERS
DEPUTY STATE'S ATTORNEYS

STATE'S ATTORNEY FOR ANNE ARUNDEL COUNTY
101 SOUTH STREET
ANNAPOLIS, MARYLAND 21401
301-224-7702

May 16, 1983

The Honorable Eugene M. Lerner
Circuit Court for Anne Arundel County
Courthouse
Annapolis, Maryland 21401

RE: [redacted] vs [redacted]
Divorce Number 23,663

Dear Judge Lerner:

It has come to my attention that at a recent hearing held pertaining to the above referenced matter, your position relative to visitation being extended to the Respondent herein was affected by your impression that this Office had determined not to pursue this case from a criminal standpoint.

Please be aware, that as a result of a recent re-evaluation, combined with discussions with many people regarding the merits of this case, a decision has been made to actively pursue it from a criminal standpoint.

If I can be of any assistance to you, or provide any additional information, please do not hesitate to contact me.

Very truly yours,

Warren B. Duckett, Jr.

WBD:pap

LAURA K. ARNOLD (NAUGHTON) * IN THE
Plaintiff * CIRCUIT COURT
-vs- * FOR
[redacted] * ANNE ARUNDEL COUNTY
Defendant * Divorces No. 23,663

* * * * *

QUESTIONS FOR CHAMBERS INTERVIEW

TO [redacted] OLDER DAUGHTER

@ T130

1. What is your name?
2. Do you have any brothers and sisters?
3. Do they live at home?
4. How old are you?
5. What school do you go to?
6. Do you know the difference between lying and telling the truth? Will you tell me the truth?

Didn't Ask — (7) When you used to visit your father, did he walk around the house without any clothes on?

Didn't Ask — (8) When you used to visit your father does he walk around with his penis hanging out of his underwear?

Didn't Ask — (9) Did you ever see your father play doctor with [redacted]?

Didn't Ask — (10) When they were playing doctor did you see your father put his hand down [redacted]'s pants in her "private" area?

Didn't Ask — (11) When your father saw you watching him, did he stop?

Didn't Ask — (12) Did your father tell you that if you told anyone about his playing doctor with [redacted] that you would be punished?

(13) When you and your sister take a bath does your Daddy come into the bathroom and sit and watch you, and do you close the curtain when he wants to watch you?

Didn't Ask

DIDN'T ASK 14. Does your father go to the bathroom in front of you?

DIDN'T ASK 15. Do you tell your Dad that running around the house without your clothes isn't very nice, does he punish you, send you to your room or tell you to shut up?

DIDN'T ASK 16. Do you ever sleep in the same bed with your father?

DIDN'T ASK 17. Were there times when your Dad would punish you, put you in your room and push furniture up against the door so you couldn't get out?

18. Do you like going to your Dad's house? (Why not?)

DIDN'T ASK 19. Have you talked to Stephanie about your Dad playing doctor with her? (What did she tell you?)

DIDN'T ASK 20. Has your Dad's wife, Sandy, seen [redacted] playing doctor?

DIDN'T ASK 21. How do you feel about your father? (Afraid?) (Why?)

DIDN'T ASK

TO [redacted] YOUNGER DAUGHTER

1. What is your name?
2. Do you have any brothers and sisters?
3. Do they live at home?
4. How old are you?
5. What school do you go to?
6. Do you know the difference between lying and telling the truth? Will you tell me the truth?

ASKED ✓ 7. I understand that you used to play doctor with your father. Can you tell me how you play the game?

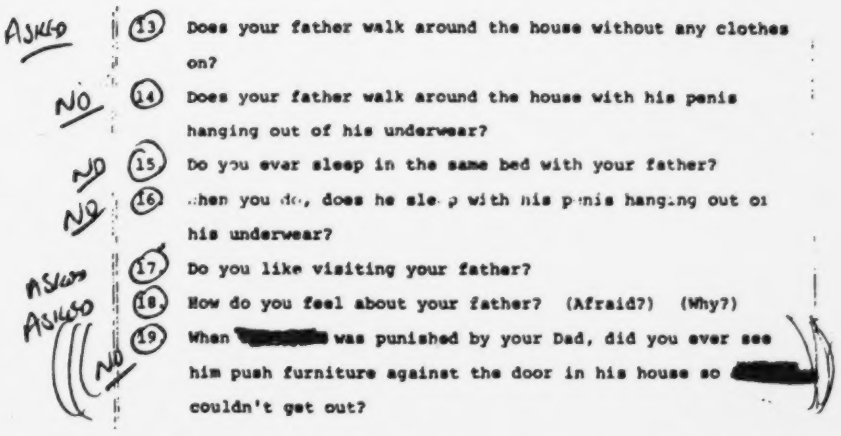
ASKED 8. Do you take your father's temperature and heart beat?

ASKED 9. Does your father ever examine you?

ASKED ✓ 10. Did he ever examine your private area (potty)?

ASKED 11. When you asked your father what he was doing, did he stop?

NO ✓ 12. Did your Dad ever say "if you tell, I'll get you"?


ASKED
13 Does your father walk around the house without any clothes on?
NO
14 Does your father walk around the house with his penis hanging out of his underwear?
NO
15 Do you ever sleep in the same bed with your father?
NO
16 When you do, does he sleep with his penis hanging out of his underwear?
ASKED
17 Do you like visiting your father?
ASKED
18 How do you feel about your father? (Afraid?) (Why?)
NO
19 When [redacted] was punished by your Dad, did you ever see him push furniture against the door in his house so [redacted] couldn't get out?

Senator SPECTER. I commend you for your persistence. I think it is indispensable. I know it is not easy. But the quotation you read was my comment, that you can manage your own affairs, you can select the attorneys, and you do have remedies, although it is very difficult to achieve them. And it may be that these hearings and the attendant focus of attention on child molestation cases will result in having that trial judge take a closer look at this matter.

You have achieved a significant victory in having the matter reversed and remanded to the lower court for further proceedings.

I would suggest to you further that you not abandon the criminal process as well. How long ago did these acts occur? Has the statute of limitations expired, is the thrust of my question.

Mr. ARNOLD. No; it has not. The last would be April 1982.

Senator SPECTER. Well, there are an entire range of remedies which a person has when a prosecuting attorney refuses to act. When the district attorney refuses to act, and you have run it through his own office, you then have recourse in most States to the State attorney general, who has powers to supervene if there is failure to act. And there are a number of States where you have the power, if the attorney general refuses to act, to petition the court to direct the prosecution or to appoint private counsel to represent the State in a case if there is dereliction of duty and a willful refusal to prosecute.

There has been some notoriety recently on the issue of the special prosecutor, where a Federal judge ordered the Attorney General to proceed, which is part of judicial supervision over prosecutorial discretion, a field that I have had substantial experience in. And there are ways to proceed if the statute of limitations has not expired.

I know it is time consuming, and I know it is expensive, and I know it is difficult. But the kind of tenacity you have shown, I think, will produce results. But it is not easy. It is a tough area, but your very major interests are involved here, and I certainly think through eight hearings and $33,000 in the appellate process, et cetera, you have shown your toughness. Just keep at it.

Senator Hawkins.

Senator HAWKINS. I commend you, also, and I do not know how many average families could afford $33,000. They probably would have given up by now. I would urge you also to continue to persevere and to stay in touch with this committee. I believe this is your best friend.

Mr. ARNOLD. Thank you.

Senator SPECTER. Thank you very much.

I would like to call now Mr. Gary Melton, representing the American Psychological Association and the Association for the Advancement of Psychology, and director of the law and psychology program, University of Nebraska-Lincoln.

I regret the delay. This hearing was not supposed to have taken so much time. Many hearings are not, but there is very important testimony here, and we have had some interruptions which we could not avoid.

I very much appreciate your being here, Mr. Melton. Your full testimony will be made a part of the record, and to the extent that you could summarize it, we would appreciate it.

STATEMENT OF GARY B. MELTON, ON BEHALF OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION AND THE ASSOCIATION FOR THE ADVANCEMENT OF PSYCHOLOGY, AND DIRECTOR, LAW AND PSYCHOLOGY PROGRAM, UNIVERSITY OF NEBRASKA-LINCOLN

Mr. MELTON. Thank you, Senator.

I am pleased to testify today on behalf of the American Psychological Association and the Association for the Advancement of Psychology. I am an associate professor of psychology and law at the University of Nebraska-Lincoln, and I specialize on scholarship on issues in terms of children's participation in legal proceedings and legal decisionmaking. I have submitted three articles to your staff to be included in the record as an appendix.

What I would like to do is to talk very briefly about two psycholegal issues that bear on child sexual abuse victims' participation in the courtroom process—first, with respect to children's competency to testify, and second, with respect to several procedural and evidentiary reform proposals which have been made and indeed, as we have heard, have been adopted by some States.

With respect to children's competency to testify, my own reading of the literature is that with proper preparation, even very young children—children aged, 3 and 4—can handle the demands of testimony. A review of psychological research on children's cognitive abilities reveals that first, with respect to memory, the recognition ability of children at age 4 is analogous to that of adults, even for relatively long periods of time. The longest period that I am aware of in terms of study is about 1 month, which may not be directly relevant to some situations.

Second, in terms of moral development, there is a very low correlation, if any, between age and honesty. Where there is an observable relationship, it has to do with children's reasons for moral behavior—for telling the truth, for example—which may not be relevant to the question of the probative value of their testimony. Yet, it may be relevant with respect to a third point, that is, suggestibil-

ity, in that young children tend to perceive the morality of acts in terms of whether they are going to be punished for them and what authority figures think about whether something should or should not be done. Even the suggestibility effects, though, I would argue are weaker and more complex than most people assume. First of all, for some forms of suggestibility, young children are actually less suggestible than adults are; for example, with respect to verbal nuances that are communicated in leading questions. And there is at least one study suggesting that children in kindergarten and first grade children are no more vulnerable to leading questions than are adult witnesses. The caveat to that, obviously, as we have heard today, is that young children may be asked more leading questions over the course of their testimony because they have less spontaneous recall and need some prompting to remember.

Fourth, with respect to cognitive development, it is well known that young children have difficulty understanding complex situations. However, in the case of sexual abuse, we are talking about what ultimately may be very concrete descriptions of events. And to the extent that questioning uses vocabulary familiar to the child and may include nonverbal means, like the use of dolls, then we would expect even young children to be able to testify in court about sexual abuse.

So I would conclude that, as Dean Wigmore suggested, there would be little risk from the point of view of enhancement of justice in permitting children to testify without the process of qualifying them by voir dire, which tends to be lengthy and probably is invalid, and leave to the fact-finder the job of assessing the child's credibility.

I have two qualifications to this proposition, though, both of which have to do with an assumption that children's competency to testify should be seen as an interactive construct, not something that is inside the child. One is that we are talking as much about the competency of the factfinder as we are about the competency of the child. And even if children do use childish logic, it is of little concern within this context provided that the factfinder can make proper inferences from the child's testimony.

The second is that my previous discussion about the developmental psychology literature is for the most part based on laboratory studies. Subsequently, the question arises as to the effect of various situation factors on children's cognitive and social competence. So that we would expect, for example, verbal fluency and recall to be reduced when the child is very anxious in a given situation. This factor is related to the second broad area addressed in my testimony with respect to the proposed modifications of procedure and rules of evidence to permit, for example, special hearsay exceptions, as do Washington State and Kansas; videotape depositions; in camera testimony, and so forth.

As has already been noted, such proposed modifications of legal procedure raise substantial constitutional issues with respect to the defendant's sixth amendment right to confrontation and to a public trial, and to the public's first amendment right, through the press, to access to the trial process.

The Supreme Court's 1982 decision in *Globe Newspaper Co.* v. *Superior Court* suggests that mandatory aberrations in procedure and

evidentiary rules, or at least, those that rise to the constitutional level, are unlikely to withstand strict scrutiny. On the other hand, case-by-case closure to the press—for example, where there is evidence that a particular child may be especially vulnerable—may withstand constitutional scrutiny, provided that a compelling State interest has been demonstrated and is narrowly drawn.

A number of psychological considerations also lead me to believe that further broad procedural reform may be premature. First of all, while the process of testimony may be traumatic for some children, for other children who have been properly prepared, it can in fact be a more positive experience. There are certainly case reports in the literature of children who experience the possibility of testimony as being both a vindication, sort of putting things to an end, and even a cathartic experience.

The second argument I would make is that we really do not know enough about children's understanding of the courtroom process, much less of the effects of the various proposed reforms, to make a very informed judgment about what sorts of procedural modifications are necessary, and for which children, and in which kinds of cases. We do not know, for example, how even children who are not involved in the legal process understand what an attorney does, understand what the courtroom process is, and so forth. While there has been a burgeoning literature in recent years on children's competence as legal decisionmakers, there is a real vacuum in terms of knowledge about the effects of various procedures on the legal system and child participants. That is true not just with respect to sexually abused children, but with respect to children in the legal system generally. We do not know, for example, what the experience of children in custody disputes is regarding their own testimony——

Senator SPECTER. But you think that there may be, or you are testifying that in your judgment, there is some value to having the child testify as drawing the curtain on the matter and having a beneficial effect for the child.

Mr. MELTON. For some children, it seems to——

Senator SPECTER. But you cannot generalize?

Mr. MELTON. Right.

Senator SPECTER. When you talked about competency, leaving it to the factfinder, as Dean Wigmore says, where do you draw the line on age?

Mr. MELTON. Well, obviously, at some point, children are sufficiently nonverbal that it becomes a moot point.

Senator SPECTER. If the child is verbal, is that child sufficiently competent in your judgment to testify?

Mr. MELTON. From what I understand of the literature, children aged 3 or 4, for example, for the most part are able to give relatively good descriptions.

Senator SPECTER. What is the earliest age that you know of where a child has been verbal?

Mr. MELTON. Well, children typically are able to speak in sentences by about age 3. I am aware of cases where children have been qualified as witnesses at age 4.

Senator SPECTER. Will you venture the judgment, opinion, that at age 3, a child should be competent to testify?

Mr. MELTON. I would say that if the jury or the judge, as the case may be, can judge children's testimony——

Senator SPECTER. So as long as they are verbal, you would say let them testify.

Mr. MELTON. Yes, and leave it to the factfinder. The qualifier to that is that we really do not have much evidence about how jurors interpret children's testimony.

Senator SPECTER. We have some evidence about how judges do.

Mr. MELTON. Right.

Senator SPECTER. And hearsay, your sense is let the hearsay in—all the way in; no direct evidence? I do not know why I am asking legal questions to you, sir.

Mr. MELTON. Well, I do teach law classes, but I am not a lawyer.

Senator SPECTER. You teach law classes, but you are not a lawyer?

Mr. MELTON. Right.

With respect to the hearsay exception, several issues arise. One has to do with the issue of psychological unavailability, which——

Senator SPECTER. Well, the real issue on hearsay is reliability. That is the real issue. The hearsay is admitted without the declarant under oath or subject to cross-examination. Are you representing, based on your experience as a psychologist, contrasted with your being a legal instructor, that there is sufficient reliability so that it ought to be admissible, hearsay declarations, without the safeguards of the oath or cross-examination?

Mr. MELTON. OK. There are obviously different policy issues at stake. With respect to reliability itself, the reliability of children's accounts, given outside of the courtroom where they have been informed about the seriousness of the matter may well be as great or better than in the courtroom situation itself.

What I was starting to say with respect to the admissibility of hearsay is that at least in the Kansas and Washington statutes—and I am aware of some other States without special exceptions where there have been attempts to rely on traditional hearsay exceptions on the grounds of the child being unavailable to testify as well as the testimony being very reliable—the understanding of what psychological unavailability is seems to me not very advanced.

The other issue I would raise is, assuming that in general we prefer to have live testimony for policy reasons, that there needs to be an evaluation of the effects of special hearsay exceptions for example, as provided by the Kansas and Washington statutes. Does, in fact, the availability of special hearsay exception increase the number of reports, as some have argued that it might? What, in fact, is children's experience in terms of this argument that they are psychologically unavailable? As I have already indicated, there is some evidence that at least some children find the testimony experience to be perhaps stressful, but not inordinately so.

Senator SPECTER. Do you have anything further that you would like to say, Mr. Melton?

Mr. MELTON. I had one more point that I wanted to make, and that is that under the Federal Victim and Witness Protection Act and under analogous laws at the State level, there is the opportunity for what might be thought of as moderate reforms in terms of,

for example, separate waiting rooms for children, special provisions for interviewing, and so forth, that could be attempted. And it seems to me that given the vacuum that currently exists in how we understand children's abilities in the legal process, or their comprehension of the legal process, or response to it generally, that there really is a need for a major research initiative here. This may be a place—for example, the Office of Juvenile Justice and Delinquency Prevention——

Senator SPECTER. How would you formulate that project?

Mr. MELTON. Well, one obvious possibility would be in terms of identifying some specific questions in the general area——

Senator SPECTER. Would you do this for us—the time is running very late—would you write to me about that?

Mr. MELTON. I would be happy to.

Senator SPECTER. I am very much interested, and we do not have time to explore it now, on the scope of a research project that you think would be useful in furtherance of what you have testified to.

Mr. MELTON. I would be pleased to do that, Senator.

Senator SPECTER. We would be very appreciative.

Is there anything else you would care to add?

Mr. MELTON. That was my last point.

Senator SPECTER. OK. Well, thank you very much, Dr. Melton, for coming and for providing the very helpful written testimony and for your statement orally, as well.

Mr. MELTON. Thank you.

Senator SPECTER. The hearing is adjourned.

[Whereupon, at 12:37 p.m., the subcommittee was adjourned.]

[The prepared statement of Mr. Melton and additional material follow:]

Prepared Statement of Gary B. Melton

Mr. Chairman and Members of the Subcommittee, it is indeed an honor and a pleasure to be here today to testify on behalf of the American Psychological Association on the subject of child sexual abuse victims in the courtroom.

I am Dr. Gary Melton, Associate Professor of Psychology and Law and Director of the Law/Psychology Program at the University of Nebraska-Lincoln. I have conducted extensive research in the area of children's competence to participate in legal proceedings and would like to submit three relevant articles for inclusion in the hearing record. While I am speaking on behalf of the American Psychological Association in my capacity as Chairman of the Task Force on Legal Issues of the Division of Child, Youth, and Family Services, I would like to state that the views presented here do not represent any formal position of the Association.

In my testimony, I will present the psychological issues and research knowledge underlying two broad questions of legal policy relevant to the participation of sexually abused children in the legal system. First, I will discuss children's competency to testify in court. Second, attention will be given to the several proposals for reform of criminal procedures and evidentiary rules to protect child victims from the trauma which the trial process is presumed to engender.

Children's Competency to Testify

Although there is usually a rebuttable presumption of children's incompetence to testify in court, it is well established in Anglo-American jurisprudence that the question of whether children's testimony is sufficiently reliable to enhance justice is to be decided on a case-by-case basis. The traditional view is reflected in the Supreme Court's 1895 decision in Wheeler v. United States.[1] In that case, the Court held that the five-year-old son of a murder victim was properly qualified as a witness. Rather than invoking a per se rule that young children are, by reason of their immaturity, incompetent to testify, the Court held that the admissibility of a child's testimony is dependent upon the trial judge's determination of "the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former."[2]

Concretely, children's competency to testify is usually assessed through a wide-ranging voir dire focused on a variety of moral, cognitive, and social skills: the child's ability to differentiate truth from falsehood, to comprehend the duty to tell the truth, and to understand the consequences of not fulfilling this duty; the child's cognitive capacity to form a "just impression of the facts" at the time of the alleged offense and to communicate memories of the event in response to questions at trial; the child's ability to organize the event cognitively and to differentiate it from his or her other thoughts and fantasies; the child's ability to withstand suggestions by parents, attorneys, and other adult authority figures. In cases of sexual abuse, the child is also required in some courts to demonstrate an understanding of the meaning of sexual terms and behavior.

Although there are some qualifiers, the available research generally supports the potential of children as young as age 4 to present testimony which is reliable, or at least as reliable as that produced by adult eyewitnesses.[3] Research on children's memory is illustrative. In general, laboratory studies, including simulations of eyewitness tasks,[4] suggest that four-year-old children's recognition memory is comparable to that of adults. There is, however, a developmental trend in the amount of information produced on free recall. Nonetheless, that information which is elicited on free recall is especially likely to be accurate, perhaps as a result of the relative lack of interpolation into memory by young children of what they think they should have seen, heard, or experienced in a given situation. In sum, then, the available data suggest that even young children generally have sufficient memory skills to respond to the recall demands of testimony. However, their lack of productivity on free recall may mean that more extensive questioning is needed to elicit their memories than would be true of adult witnesses.

Young children's cognitive abilities are more problematic. Young children typically have difficulty in conceptualizing complex events and ordering them in time and space. In particular, they tend to center their attention on one aspect of a stimulus rather than on multiple factors in conceptualization and reasoning. However, this difficulty may not be very relevant to the nature of the testimony which a child may be required to give in cases of sexual abuse.

That is, the child may be able to give a concrete description of what happened, provided that questions are direct and in language familiar to the child. In such an instance, the child's difficulty in conceptualizing the event may not be very important. The significance of such skills is especially likely to be minimized if the child is able to use concrete means of communication (e.g., pointing to parts of an anatomically correct doll) so that verbal fluency is less important.

Even if children can adequately relate their experiences, there still may be concerns about whether they will do so truthfully. In fact, however, there is little correlation between age and honesty. Where there is a pronounced developmental trend is in the reasons children give for moral decisions, a trend which is arguably irrelevant to the probative value of children's testimony. However, young children's immaturity of moral and social reasoning may make them more vulnerable to adult suggestions.

Young children tend to conceptualize the morality of an act in terms of the probability of punishment by adult authorities. Hence, they may perceive little actual freedom in decision-making. The directly relevant research is admittedly scant and removed from the problem of "telling on" parents or other adults important to the child. However, at least one study[5] found that children in kindergarten and first grade were no more swayed by the suggestions embedded in a leading question than were adult witnesses.

In actuality, children may be less easily influenced than adults by suggestions implicit in subtle changes of wording. On the other hand, when children lack the cognitive skills or experience to organize a perception, they may be especially vulnerable to adults' explanations of what may have occurred. The child may be dependent upon adults to clarify the meaning of an event foreign to the child's previous experience. Thus, there may be reason to be concerned about children's vulnerability to suggestion, but even here the age trends may be weaker, or at least more complex, than might be expected. That is, a blanket statement that children are more suggestible than adults is not justified by the available research.

Given the amount of time consumed by voir dire of child witnesses, there may be reason, as Dean Wigmore argued,[6] to admit children's testimony without establishing their competency. In most cases where there is a real question of the child's competency to testify, the validity of the inquiry on

voir dire is questionable.[7] Especially given the relatively minor effects which developmental factors are likely to have on the veracity of children's testimony, a reasonable policy might be simply to allow the trier of fact to judge the credibility of the child in the same way that any witness's testimony must be evaluated.

Two qualifiers must be made to this conclusion, however. Both are caveats about misconceptualizing the question of children's competency to testify as an internal attribute of the child. In fact, children's competency to testify might be better understood as an interactive construct. First, the issue of competency to testify is as much an issue of judges' and jurors' capacities as that of the child. Even if children's testimony were influenced by childish logic, the admission of such testimony would still enhance justice if the trier of fact could validly interpret the reality underlying the child's account of the event. Second, the level of competency of the child is likely to vary with the situation. High levels of anxiety adversely affect recall and cognitive functioning. Thus, interventions designed to reduce ambiguity about the situation (e.g., visiting the courtroom prior to testimony) and the scariness of testimony itself (e.g., a friendly word from the judge) may improve the quality of children's testimony.

Procedural and Evidentiary Reforms

Concern with the level of stress engendered (or alleviated) by legal procedures is not, of course, simply a matter of increasing children's productivity as witnesses. There is also a need to minimize stress for the child's own sake. Child advocates wish to ensure that the child victim of sexual abuse is not victimized again by the legal process itself. With that goal in mind, there have been a number of proposals for procedural and evidentiary reforms intended to reduce the risk of children being traumatized by the legal process, while also permitting alleged child molestors to be brought to justice. In general, these proposals provide for limiting the audience during child victims' testimony and/or preventing direct face-to-face confrontation by the defendant. Among the procedural reforms suggested are permitting the child to testify in front of a one-way mirror (outside the physical presence of the defendant)[9] and admitting videotaped depositions in lieu of testimony at trial.[10] Alternatively, some have argued that the

courtroom testimony of child victims of sexual abuse should not be necessary. In that vein, Kansas[11] and Washington State[12] have recently enacted statutes permitting admission of hearsay about child victims' statements.

These proposals all raise serious constitutional issues. Each arguably invades one or more of the following fundamental rights: the defendant's sixth amendment rights to a public trial and to confrontation of witnesses and the public's first amendment right, through the press, to access to the trial process. Although most of these issues have yet to be litigated, the Supreme Court's decision in Globe Newspaper Co. v. Superior Court[13] gives a clear message that mandatory procedural aberrations in cases involving child sexual abuse are unlikely to withstand strict scrutiny. In Globe, the Court struck down as violative of the first amendment a Massachusetts statute providing for mandatory closure of the courtroom to the press (and others not having a direct interest in the case) during testimony by a minor victim of a sex offense. Writing for the majority, Justice Brennan acknowledged that protection of minor victims is a compelling state interest, but he found the Massachusetts statute to be insufficiently narrow in its scope. Justice Brennan argued that some minor victims might want publicity of the trial so that they could expose the heinous behavior of the defendant; others might simply not be bothered by presence of the media. Moreover, the incremental protection of witnesses' privacy offered by the statute was minimal in that Massachusetts already permitted publication of the victims' names in the court record.

The Globe majority was also unpersuaded that mandatory closure would increase reporting of sex offenses against children. Even if empirical evidence to that effect were available -- as it is not -- it is hard to imagine research which would be so overwhelming as to permit mandatory closure. Justice Brennan argued that a mandatory-closure statute would be justified on the ground of enhancing the frequency and quality of children's testimony only if it could be shown that "closure would improve the quality of testimony of all minor victims,"[14] an impossible task.

Globe indicates that broad procedural reforms to protect child witnesses are unlikely to pass constitutional scrutiny. Regardless, such reforms are premature. Both the need for substantial modifications of procedure and the

effectiveness of such procedures in reducing courtroom trauma are undocumented and indeed unstudied. The assumption by the Globe dissenters and others that "certainly the (traumatic) impact (of trial procedures) on children must be greater"[15] than on adult victims of sexual offenses is plausible. Children are less likely than adults to have the cognitive and emotional resources for understanding the experience, and legal authorities not used to communicating with children may find it difficult to allay their concerns. However, particularly for young children, it is equally plausible that children's responses are less severe on average than those of adults. Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the trial experience will cause little trauma. At least for some child victims, the experience may be cathartic;[16] it provides an opportunity for taking control of the situation, achieving vindication, and symbolically putting an end to the episode.

Even assuming that the legal process is psychologically harmful for some child victims, there is essentially no research literature on which to base interventions to prevent such harm or, as Globe permits,[17] to identify particularly vulnerable child victims so that trial procedures (e.g., access of the press) may be modified to protect them. At present, the literature is virtually barren on these points,[18] as it is to a large extent with respect to children's involvement in the legal system generally. Although there is a rapidly burgeoning literature about children's competence as legal decision-makers,[19] basic research is lacking on their understanding of the legal process. We do not know, for example, how young children understand the role of an attorney and the nature of the adversary process.

Although research on sexually abused children's responses to testimony in criminal trials is hampered by the small number of children who actually testify in such cases, it would be useful to "debrief" children after testimony to obtain at least a subjective appraisal of the experience and the thoughts it provoked. Such data-gathering seems to be a first step in developing techniques of allaying children's anxiety while at the same time meeting the needs of the legal system. Research of this sort would most likely be useful to police investigators, prosecutors, and mental health and social service professionals who work with sexually abused children, as well

as policy makers. Moreover, such knowledge would be helpful in preparing sexually abused children and others, especially those involved in emotionally charged disputes (e.g., contested custody), to testify in court.

There is also a need to test the efficacy of particular procedural reforms. At least until such time as the constitutionality of state statutes providing, for example, a special hearsay exception is successfully challenged, there is the opportunity for direct study of the effectiveness of such reforms in increasing the frequency of reports of sexual abuse, enhancing the quality of testimony, and diminishing whatever trauma is engendered by the trial process. Such state reforms might legitimately be viewed as "natural experiments" enabling us to learn ways of ensuring humane treatment of child victims by the legal system.

In addition, the Federal Victim and Witness Protection Act of 1982 and analogous State victim-protection statutes provide opportunities to test the efficacy of special procedures to protect child victims which are supplements to, rather than fundamental changes of, existing criminal procedure. Some of these interventions designed to provide assistance to victims and their families (e.g., special efforts to explain the process) are intuitively helpful and require little alteration of typical procedures. Other possible interventions (e.g., modification of the physical layout of the courtroom; involvement of the child or the family in prosecutorial decision-making) are less clearly desirable, although they may be very useful for some children. Careful development and evaluation of such interventions is needed, with particular attention to the appropriateness of various procedures for the specific case involved. Research would also be useful to determine the most effective methods of training for police, prosecutors, and judges and counseling for parents in preparing sexually abused children for participation in the legal process and identifying and alleviating any psychological ill effects which may arise.

In conclusion, the developmental psychology literature gives little reason to be especially concerned about the reliability of children's testimony. Accordingly, a sound policy might be to admit children's testimony without respect to their competency to testify. Attention needs to be given, however, to factfinders' comprehension of children's testimony and to the interaction

between children's developmental level and the courtroom context in determining the quality of their testimony. Legal procedures also need to be examined with respect to their effect upon the child's emotional well-being. At the present time, however, there is insufficient evidence to justify substantial modifications of criminal procedure on psychological grounds. There is a need for a substantial research initiative to examine the effects of legal procedures on children, both to ensure that sexual abuse victims are not doubly victimized and, more generally, to provide the information needed to assist children in making use of, and adjusting to, legal procedures. The Federal government could play a very useful role in facilitating an assessment of the effects of various State procedural innovations to facilitate the participation of children as witnesses in courtroom proceedings.

I am very pleased to be able to testify on behalf of the American Psychological Association on the critical issue of child sexual abuse victims as witnesses in the courtroom. If I can be of any further assistance to the Subcommittee, please feel free to call upon me. Thank you.

Footnotes

1. 159 U.S. 523 (1895).

2. Id. at 524-25.

3. There are, of course, well-documented vagaries of testimony by adult eyewitnesses. See generally E. LOFTUS, EYEWITNESS TESTIMONY (1979).

4. See Marin, Holmes, Guth, & Kovac, The Potential of Children as Eyewitnesses: A Comparison of Children and Adults on Eyewitness Tasks, 3 LAW & HUM. BEHAV. 295 (1979).

5. Id.

6. 2 WIGMORE ON EVIDENCE 601 (3d ed. 1940).

7. For example, the series of questions commonly asked about the child's religious beliefs and understanding of the significance of an oath probably has little, if any, correlation with the child's predisposition to tell the truth. See Melton, Children's Competency to Testify, 5 LAW & HUM. BEHAV. 73 (1981), at 74 n.1 and 79-80.

8. See Melton, Procedural Reforms to Protect Child Victim/Witnesses in Sex Offense Proceedings, in CHILD SEXUAL ABUSE AND THE LAW (J. Bulkley, ed. 1981) (report of the ABA National Legal Resource Center for Child Advocacy and Protection); Melton, Child Witnesses and the First Amendment: A Psychological Dilemma, 40(2) J. SOC. ISSUES -- (1984).

9. See, e.g., Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 977 (1969); Parker, The Child Witness Versus the Press; A Proposed Legislative Response to Globe v. Superior Court, 47 ALB. L. REV. 408 (1983).

10. Several states have statutory provisions permitting admission of videotaped depositions in sexual abuse cases. E.g., ARIZ. REV. STAT. ANN. § 12-2312 (1982); FLA. STAT. ANN. § 918.17 (West Supp. 1983); MONT. CODE ANN. §§ 46-15-401 to - 403 (1981); N.M. STAT. ANN. § 30-9-17 (1978).

11. KAN. STAT. ANN. § 60-460(dd) (Supp. 1982).

12. WASH. REV. CODE ANN. § 9A.44.120 (Supp. 1982). The Kansas and Washington statutes have been analyzed in detail by one of my students, Skoler, New Hearsay Exceptions for a Child's Statements of Sexual Abuse, __ J. MAR. L. REV. __ (forthcoming).

13. 102 S.Ct. 2613 (1982).

14. Id. at 2622 n.26.

15. Id. at 2626 n.7 (Burger, C.J., joined by Rehnquist, J., dissenting).

16. See Berliner & Barbieri, Legal Testimony by Child Victims of Sexual Assault, 40(2) J. SOC. ISSUES __ (1984); Pynoos & Eth, The Child as Witness to Homicide, 40(2) J. SOC. ISSUES __ (1984); Rogers, Child Sexual Abuse and the Courts: Empirical Findings (paper presented at the meeting of the American Psychological Association, Montreal, Sept. 1980).

17. 102 S.Ct. at 2621.

18. There are two studies directly on point. Burgess & Holmstrom, The Child and Family in the Court Process, in SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS (A. Burgess, N. Groth, L. Holmstrom, & S. Sgroi eds. 1978); V. DEFRANCIS, PROTECTING THE CHILD VICTIM OF SEX CRIMES COMMITTED BY ADULTS (1969) (report of the American Humane Association). However, both studies have significant methodological limitations and may best be viewed as pilot clinical interview studies useful primarily for formulating hypotheses for more rigorously designed research.

19. See generally CHILDREN'S COMPETENCE TO CONSENT (G. Melton, G. Koocher, & M. Saks eds. 1983); Melton, Developmental Psychology and the Law: The State of the Art, 22 J. FAM. L. __, __ (1984).

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Children's Competency To Testify

Gary B. Melton*

Case law and relevant psychological research on children's competency to testify are reviewed. Memory in young children is not problematic if direct, simple questions are used. Children's difficulty in free recall, however, may make them more subject to leading questions. There is no pronounced developmental trend in honesty, and attempts on voir dire to assess honesty are probably invalid. Of most concern is young children's ability to form "just impression of the facts." Even children's limited conceptual skills may not be problematic, however, if jurors can discern the objective reality from the child's description, a point as yet unresearched. Research is also needed on the ways in which the courtroom setting affects a child's behavior.

While the age at which the presumption is set varies across jurisdictions,[1] there is generally a rebuttable presumption that children are incompetent to testify. Although recognizing that children may be less likely than adults to give reliable testimony, the courts have been reluctant to hold that, because of age, children below the designated age are per se incompetent to testify. Rather, the competency of child witnesses of any age must be established on a case-by-case determination of whether the child's testimony will enhance justice.[2]

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[1]In the majority of states, the rule for assessing competency of a child witness is established by case law alone. In those states where there is a statutory guideline, children under age 10 are presumed incompetent, and children above age 10 are presumed competent. Even in these states, however, with the exception of Arkansas, these presumptions are rebuttable (Siegel & Hurley, 1977). Courts have held children competent as young as 4 years old (Stafford, 1962).

[2]This principle is well established in case law. For reviews of the scores of supporting cases, see Collins & Bond (1954), Note (1953), Siegel & Hurley (1977), Stafford (1962), and Thomas (1956). *See e.g.,* United States v. Perez, 526 F.2d 859(5th Cir. 1976); United States v. Schoefield, 465 F.2d 560 (D.C. Cir. 1975), *cert. denied,* 409 U.S. 881 (1972).

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CASE LAW

This principle has been established in Anglo-American law since the 18th century.[3] The traditional view is reflected in the United States Supreme Court's 1895 decision in *Wheeler v. United States*.[4] In that case the Court held that the 5-year-old son of a murder victim was properly qualified as a witness:

> That the boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness, is clear. While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath.[5]

In determining a child's competency to testify, the courts have tended to place primary emphasis on the child's ability to differentiate truth from falsehood, to comprehend the duty to tell the truth, and to understand the consequences of not fulfilling this duty.[6] This inquiry has often followed a line of questions on voir dire directed toward ascertaining a child's religious and moral beliefs.[7] The child need not, however, understand the legal and religious nature of an oath.[8] Rather, it is sufficient

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[3]Rex v. Brasier, 1 Leach 199, 168 Eng. Rep. 202 (1770). ". . . [T]hat an infant, though under age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath . . . for there is no precise or fixed rule as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received . . ." 1 Leach 199, 200, 168 Eng. Rep. 202, 203.

[4]159 U.S. 523 (1895).

[5]*Id.* at 524–525.

[6]The voir dire in *Wheeler* was exemplary: "The boy . . . said among other things that he knew the difference between the truth and a lie; that if he told a lie the bad man would get him, and that he was going to tell the truth. When further asked what they would do with him in court if he told a lie, he replied they would put him in jail. He also said that his mother had told him that morning to 'tell no lie,' and in response to a question as to what the clerk said to him, when he held up his hand, he answered, 'don't you tell no story.' " *Id.* at 524.

[7]One commentator (Note, 1953) suggested a "typical group of questions": "What is your name? How old are you? Where do you live? Do you go to school? Do you go to Sunday School? Do you know what happens to anyone telling a lie? Do you know why you are here today? Would you tell a true story or a wrong story today? Suppose you told a wrong story, do you know what would happen? Do you know what an oath is? Did you ever hear of God?" (p. 362). A somewhat more recent commentator (Stafford, 1962) also suggested that an assessment of a child's competency should include "questions about his attendance at church or Sunday School, including his frequency of attendance, names of his teachers, pastor and location of his church" (p. 316). Besides raising a constitutional issue, these questions are probably of little probative value today in view of changing norms of church attendance. Regardless, from a cognitive-developmental perspective, such questions would shed little light on the child's ability to apply moral principles. Questions about church attendance are nonetheless still commonly used (Siegel & Hurley, 1977). *See, e.g.*, Brown v. United States, 388 A.2d 451, 458 (D.C. Mun. Ct. App. 1978).

[8]*See, e.g.*, State in Interest of R.R., 79 N.J. 97, 398 A.2d 76 (1979); State v. Manlove, 441 P.2d 229 (N.M., 1968); Posey v. United States, 41 A.2d 300 (D.C. Mun. Ct. App. 1945); State v. Collier, 23 Wn. 2d 678, 162 P.2d 267 (1945); People v. Delaney, 52 Cal. App. 765, 199 Pac. 896 (1921). Given that part of the

that the child have a general understanding of the moral obligation to tell the truth.

While necessary, adherence to the truth is not sufficient to establish competency. There is also a necessity that the child have cognitive skills adequate to comprehend the event he or she witnessed and to communicate memories of the event in response to questions at trial.[9] If a child's view of the truth bears little resemblance to reality, it will also have little value to the trier of fact. Thus, competency to testify implies some measure of competency at the time of the event witnessed as well as at the time of the trial.[10] The child must be able to organize the experience cognitively and to differentiate it from his or her other thoughts and fantasies.[11] Furthermore, the child must be able to maintain these skills under psychological stress and under pressure, real or perceived, from adult authority figures to shape his or her responses in a particular way. Thus, level of suggestibility is an important factor.[12] Particular kinds of testimony may require further specific competencies. Most notably, testimony by children on sexual abuse may require verification of the child's comprehension of the meaning of sexual terms and behavior.[13]

The implication of the discussion thus far is that assessment of a child's competency to testify may require a rather extensive and formal assessment of the child's cognitive, moral, and emotional capacities on voir dire. Given that time will be consumed in any event and that there is no litmus test for competency, Wigmore (1940,

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reason an oath is administered is to subject the witness to penalties of perjury if he or she lies, there has been some question whether young children (usually under age 7) could ever be competent because of their lack of potential criminal liability under common law and, in some states, by statute. Such a view seems overly narrow, particularly given that the oath itself (and the threat of punishment, whether divine or secular, for lack of adherence to it) probably has little effect on behavior. In fact, the argument of a necessity of potential liability for perjury has generally not been sustained (Stafford, 1962).

[9]"A child is competent to testify if it possesses the capacity to observe events, to recollect and communicate them, and has the ability to understand questions and to frame and make intelligent answers, with a consciousness of the duty to speak the truth." Cross v. Commonwealth, 195 Va. 62, 64, 77 S.E. 2d 447, 449 (1953).

[10]The standard for competency as a witness at the event itself may be lower than the standard for competency to testify. Courts have occasionally ruled children competent who were found to be incompetent at earlier trials. Apparently the courts assumed the earlier deficit was in their capacity to recollect and communicate their impressions rather than in their capacity to observe, encode, and conceptualize their experiences. Cross v. Commonwealth, *supra;* Burnham v. Chicago G.W.R.R., 340 Mo. 25, 100 S.W.2d 858 (1937) (child found incompetent in prior trial allowed to testify after dream supposedly refreshed memory). It is noteworthy that these courts apparently assumed a sequence of psychological development which is reversed in reality. See discussions of memory and cognitive development *infra.*

[11]The child must have been able to form "just impression of the facts." "There is the danger that a child will intermingle imagination with memory and thus have incorrect statements irretrievably engraved on the record by a guileless witness with no conception that they are incorrect or that the words should not have been spoken." (Stafford, 1962, p. 309)

[12]People v. Delaney, *supra;* Macale v. Lynch, 110 Wash. 444, 188 Pac. 517 (1920). Suggestibility is a particularly important issue when the defendants are parents or other significant adults in the child's life. *See* Gelhaar v. State, 41 Wisc. 2d 230, 163 N.W. 2d 609 (1969); State v. Hunt, 2 Ariz. App. 6, 406 P.2d 208 (1965); Benedek & Benedek (1979); Siegel & Hurley (1977).

[13]Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956). In that case, the trial court erred in not seeking such validation of testimony of a 12-year-old girl who was asked simply, "Did you have sexual intercourse with Hiram Riggs?" She answered affirmatively without any additional details. No evidence was presented of the girl's understanding of "sexual intercourse." *See also* Fitzgerald v. United States, 412 A.2d 1 (D.C., 1980) (jury instruction on corroboration of minors' allegations required in sex-offense cases).

§509) has recommended abolition of the requirement that a child's competency be established before he or she can testify. He would have the trier of fact simply evaluate a child's testimony in context, just as any witness's testimony must be examined for its credibility:

> A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure a priori the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire some degree of credibility, is futile and unprofitable . . . . Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is in their minds, it must be concluded that the sensible way is to put the child upon the stand and let the story come out for what it may be worth. (p. 601)

Wigmore's view has not been adopted by any American jurisdiction. Consequently, it is useful to examine psychological research which may be helpful to courts faced with assessing the value of children's testimony.

PSYCHOLOGICAL RESEARCH

Memory

There has been little research directly related to children's behavior on tasks like courtroom testimony. The most germane study was a recent investigation comparing children's and adults' performance on eyewitness tasks (Marin, Holmes, Guth, & Kovac, 1979). In that study, students aged 5 to 22 were placed in a situation in which a confederate of the experimenter interrupted a session to complain angrily about the experimenter's using a room supposedly already scheduled. Subjects were questioned about the incident after a brief interval (10–30 minutes) and after two weeks. Memory was assessed using free recall, objective questions (including one leading question), and photo identification. Older subjects were superior only on the free narrative task. Older subjects produced much more material on free recall (mean number of descriptive statements: kindergarten and first grade, 1.42; third and fourth grades, 3.75; seventh and eighth grades, 6.50; college students, 8.25). However, the youngest subjects were significantly more likely to recall correctly those items which they did produce (only 3% incorrect). Marin et al. suggested that the results supported the use even of young children as witnesses in court, particularly given that the objective questions task most closely paralleled the trial situation:

> This additional finding [of accuracy on free recall] lends . . . further support to the conclusion that even very young children can be credible eyewitnesses, particularly when combined with the other findings that children are as capable as adults of answering direct objective questions and are no more easily swayed into incorrect answers by leading questions. It appears that children are no more likely than are adults to fabricate incorrect responses, and that when their testimony is elicited through the use of appropriate cues, it is no less credible than that of adults. (p. 304)

Marin et al.'s findings were consistent with earlier laboratory studies suggesting that children as young as age 4 or 5 perform as well as adults on recognition memory tasks (Brown, 1973; Brown & Campione, 1972; Brown & Scott, 1971; Corsini, Jacobus, & Leonard, 1969; Nelson, 1971; Perlmutter & Myers, 1974, 1975, 1976;

Standing, Conezio, & Haher, 1970) but that there are marked developmental trends in free recall ability. The latter trends appear related to developmental differences in retrieval strategy. That is, young children require direct cues, such as specific, direct questions, to stimulate recall (Emmerich & Ackerman, 1978; Kobasigawa, 1974; Perlmutter & Ricks, 1979; Ritter, Kaprove, Fitch, & Flavell, 1973).

In sum, the available data suggest that, given simple, supportive questions, even young children generally have sufficient memory skills to respond to the recall demands of testimony. However, two qualifiers must be added to this conclusion. First, while some studies used lengthy recall intervals (e.g., 28 days in Brown & Scott, 1971), available research has not tested possible developmental differences in recall over periods of months, as is a common demand in the legal system. Second, available studies have not involved recall under stress or in situations of great personal involvement.

Cognitive Development

Even if children have sufficient recall ability to testify, such testimony would be of dubious value if the memories were based on erroneous impressions. Consequently, a child's ability to conceptualize complex events and to order them in space and time are of importance. It is a truism of Piagetian theory that "preoperational"[14] children, often up to age 7, are unable to "decenter" from the most obvious attribute of a stimulus so that they can make use of all of the relevant information. To cite a classic example, young children who observe a clay string rolled into a ball and then rolled back into a string believe that there is more clay present when it is in a ball, which looks more massive. This inability to deal with multiple stimulus characteristics and relationships may affect the child's ability to recite facts accurately.

For example, young children have difficulty in understanding time independent of distance and speed and may have difficulty in describing the chronology of events. Piaget (1927/1969) observed three stages in development of concepts of time. In stage 1, common among 4- and 5-year-olds, time is defined in terms of spatial stopping points of objects. The object that stops further ahead is perceived as having traveled faster, longer, and further. In stage 2, the child begins to consider other factors, such as starting points. In stage 3, achieved by age 7 or 8, the child masters the concept of time. Later investigations (Berndt & Wood, 1974; Levin, 1977; Siegler & Richards, 1979; Weinreb & Brainerd, 1975) have indicated that acquisition of the concept of time distinguished from speed and distance typically comes even later than Piaget thought, perhaps near age 10 on the average.

However, some recent critics of Piagetian theory (cf. Siegel & Brainerd, 1978) have suggested that, on many tasks, preschoolers may be less egocentric and illogical in their thinking than Piaget believed. Borke (1971, 1973, 1975, 1978) has found that children 3 to 4 years old have the capacity to take the perspective of another,[15] provided that the specific task is a simple one and involves little use of language.[16]

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[14]See Flavell (1963) for a comprehensive review of Piagetian terminology, theory, and research.

[15]The classical Piagetian assessment of this ability invokes a task of reproducing the view of a particular scene (i.e., a model of three mountains) from different vantage points (Piaget & Inhelder, 1956).

[16]*But see* Chandler & Greenspan (1972) (Borke's tasks actually involved taking perspective of oneself rather than of others). For a reply, see Borke (1972).

Siegel (1978) has argued that the classical finding of young children's inability to pass "conservation" tasks (like the ball of clay example cited at the beginning of this example) is often a manifestation of linguistic deficits. That is, young children may not understand the words "more," "bigger," etc., but they may be able to demonstrate understanding of the concepts nonverbally. Furthermore, there is considerable evidence that preschoolers can be trained in conservation skills (Brainerd, 1978), contrary to the Piagetian hypothesis of the necessity of cognitive structures which would not be expected to be developed adequately. In some instances, apparent failures on Piagetian tasks may also be the result of recency effects and organizational difficulties in recall rather than failures in conceptualization (Austin, Ruble, & Trabasso, 1977; Bryant & Trabasso, 1971.)

While these studies have considerable significance in understanding the nature of child development generally, they do not moot the point here that young children are likely to have difficulty in conceptualizing complex events and possibly therefore in describing them reliably.[17] Borke (1978), for example, interpreted previous findings of egocentrism on perspective role-taking tasks as resulting from "children's inability to perform on tasks which were cognitively too difficult for them, rather than any inherently egocentric orientation on the part of young children" (p. 38). Borke also noted that the cognitive changes in middle childhood do result in significant transformations in the child's capacity for empathy and reciprocal social interaction. Furthermore, while the work of Brainerd, Siegel, Trabasso, et al. indicates that children's capacities may be greater than frequently assumed, there is also little evidence that these abilities will be demonstrated without special training or assessment. Consequently, given the realities of the courtroom situation, cognitive-developmental factors remain a problem for evaluating children's testimony.[18]

Nonetheless, young children's immaturity of conceptualizaion may have less import for the reliability of their testimony than appears at first glance. First, the question at hand is whether children's testimony is so unreliable that jurors would be unduly influenced by it. Thus, the question is one of jurors' behavior as well as children's competency. Specifically, in the present context, can jurors accurately perceive what the objective reality was from an account of the subjective reality of the child? If so, the child's cognitive immaturity would be of less significance.

Second, children's lack of ability to comprehend a situation fully may not be so severe as to render them incapable of the level of observation required by the law. For

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[17]There are other criticisms of Piagetian theory. Information-processing theorists (Klausmeier et al., 1979) and learning theorists (Brainerd, 1978; Cornell, 1978; Overton & Reese, 1973) have argued that mentalistic explanation of broad cognitive structures are unnecessary and less parsimonious than traditional learning principles. The assumption of universal developmental processes has also been brought into question by cross-cultural research on Piagetian tasks (Ashton, 1975; Hollos, in press). However, as noted in the accompanying text, while these criticisms have considerable import for theory development, they do not moot the basic point presented here that young children tend to have difficulty in conceptualizing complex events. For the purposes of formulating policy on children's competency to testify, reasons why there are developmental factors in conceptual skills are less important than descriptions of their existence.

[18]In a largely critical essay on the philosophical assumptions of Piagetian theory, Hall and Kaye (1978) made a similar point: "If psychologists are interested in describing the normal course of cognitive development, much of Piaget's theory may be of use. If, on the other hand, the theorist is interested in determining the child's ultimate capacity at any given time, he would use the approach exemplified by Trabasso" (pp. 165–166).

example, understanding of sexuality and reproduction requires an understanding of physical causality and social identity. An accurate concept of the origin of babies is not reached typically until about age 12 (Bernstein & Cowan, 1975). On the other hand, there is evidence that by age 4 most children are quite aware of sex differences and willing to speak freely about them (Kreitler & Kreitler, 1966). Thus, in cases of sexual abuse, children can be expected to give an accurate description of what happened, provided that questions are direct and in language familiar to the child. Children will appear incompetent if the examiner uses technical vocabulary rather than slang or dolls or drawings. Monge, Dusek, and Lawless (1977) found that even ninth graders are often unfamiliar with "proper" terms for sexual anatomy and physiology:

> . . . [O]nly 38.4% of the students knew the meaning of the word *menstruation;* 13.1% knew the definition of *scrotum;* 14.1% knew what *coitus* means; 30.3% knew that *Fallopian tubes* were part of the female reproductive system, and 54.5% knew that *seminal vesicles* were part of the male reproductive system; the meaning of *menopause* was known by 27.3% of the students. (p. 179)

Moral Development

If in fact children can relate their experiences adequately, then the principal concern is whether they will do so truthfully. While the courts have been particularly concerned with this problem in assessing competency to testify, the concern here seems misplaced. There is in fact little correlation between age and honesty (Burton, 1976). Indeed, police experience with child victims confirms the research experience in other settings. From 1969 to 1974, Michigan police referred to a polygraph examiner 147 children whose veracity about allegations of sexual abuse was questioned. Only one child was judged to be lying (Groth, Note 1).

Where there *is* a developmental trend, though, is in the reasons which children give to justify behavior. As children grow older, they become increasingly more sociocentric and oriented toward respect for persons (see reviews in Lickona, 1976a). Several points are noteworthy in this context.

First, the law is less interested in the witness's attitude toward the truth and conceptualization of the truth than in his behavior. Justice will be served if the witness tells the truth regardless of his reason for doing so. Therefore, such inquiry probably is superfluous.[19]

Second, even if there is some reason to ascertain a child's conceptualization of duty to tell the truth, the yes/no and definition questions commonly used on voir dire are inadequate measures. One of the philosophical underpinnings of current cognitive-developmental theories of moral development is that a given behavior may be motivated by vastly different levels of moral reasoning (Kohlberg, 1969, 1971, 1976).[20] Similarly, asking a child to tell the meaning of "truth," "oath," or "God" probably tells more about his or her intellectual development than about the child's propensity to tell the truth.[21]

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[19]The correlation between moral judgments and moral behavior is in fact rather modest (Mischel & Mischel, 1976).

[20]For critiques of Kohlberg's theory, see Kurtines and Greif (1974); Mischel and Mischel (1976); Simpson (1974).

[21]Adherents to social-learning theory (Mischel & Mischel, 1976), the major competing theory of moral development, would agree. From their point of view, children's behavior would be influenced primarily by

Third, understanding of the oath is probably unimportant. Indeed, it probably has little effect on adult behavior. To the extent to which the oath does have an effect, it would be on a primitive level of moral development common among young children: reification of rules (Piaget, 1932/1965) and avoidance of punishment (Kohlberg, 1969, 1976).

Where immature moral development may be a factor is in suggestibility. Young children tend to perceive rules as "morally absolute," unchangeable, and bestowed by authority (Piaget, 1932/1965). Therefore, they may confuse the suggestions of an adult authority figure with the truth. This hypothesis will be considered next.

Suggestibility

One of the problems which has been noted generally in eyewitness testimony is witnesses' frequent vulnerability to suggestion by opposing attorneys in leading questions (Loftus, 1979). That is, even in average adults, suggestibility is a real problem in credibility and competence of witnesses. Given the greater suggestibility which is frequently assumed to occur in children,[22] children's testimony might be *so* unreliable that in those instances the courts would not want to take the risk of unreliability which inheres in any testimony. In addition to the cognitive-developmental factors described in the preceding section, it might be expected on the basis of simple learning theory that children's behavior would be shaped by their perceptions of adults' expectations for their testimony (and hence the kind of testimony which will be rewarded or punished), particularly given young children's essentially dependent status.

One of the more reassuring findings of Marin et al.'s (1979) investigation was that young children were no less affected by a leading question than were adults. This finding needs to be further investigated, however. There was only one leading question used in Marin et al.'s study, and the interviewer probably had less authority in the eyes of a child than would an attorney asking what seem to be threatening, challenging questions in the imposing setting of a courtroom.[23]

There is some experimental evidence for developmental changes in suggestibility, although the changes are complex ones. In one frequently cited study involving conformity to suggestions by peers (Hoving, Hamm, & Galvin, 1969) it was found that task difficulty interacted with age in the degree of conformity to peer judgments. Children in grades 2, 5, and 8 were asked to determine which of two drawings shown briefly by a slide projector contained more dots. In the most difficult condition, both drawings contained 15 dots. In a medium difficulty condition, one drawing contained 15 dots and the other 16. One drawing contained 15 and the other 17 in the third and easiest condition. Before giving their answer, the children heard two other children respond. Hoving et al. found increasing conformity by age on the most difficult task. In the medium-difficulty condition, there was increasing conformity from second to

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the rewards, punishments, and models available in a given situation (in interaction with the child's cognitive competencies).

[22]See note 12 *supra*.

[23]Developmental change in perceived authority of court officials is an empirical assumption which is still largely untested, however.

fifth grade but decreasing conformity from fifth to eighth grade. Conformity decreased by age in the least ambiguous situation. Thus, in relatively straightforward situations, older children and early adolescents are willing to withstand peer pressure and make independent judgments. On the other hand, in situations requiring careful judgment, young children were actually less vulnerable to suggestion than were older ones, who presumably wanted some verification of an uncertain judgment. This finding is consistent with Marin et al.'s (1979) finding that young children were particularly unlikely to fabricate or distort memories in response to direct questions.

Perhaps more directly germane to the legal situation is research on adult influence on children. Again, though, there is not a simple relationship between age and conformity. In research involving first, fourth, seventh, and tenth graders, Allen and Newtson (1972) observed adult influence on children's judgments to decrease sharply from first to fourth grade and then to increase slightly in tenth grade. This result was consistent across several forms of judgments: "visual" (judgment of length of line), "opinion" (e.g., "kittens make good pets"), and "delay of gratification" (e.g., "I would rather have 50¢ today than $1 tomorrow"). Such a finding is consistent with the moral development and legal socialization literature in terms of young children's inflated perception of the power of authority.[24] There is the obvious related problem of coaching or threat (real or perceived) of punishment for unfavorable testimony when parents or other adults important to the child are involved in the legal action.

Most directly on point, Fodor (1971) found that children who yielded to the suggestions of an adult interviewer tended to score lower on assessments of level of moral judgment (according to Kohlberg's criteria) than children who resisted such suggestions. Given the prevalence of low-level moral judgment among young children,[25] there is some confirmation of the cognitive-developmental prediction of high vulnerability to adult influence among young children.

It should also be noted that young children's need for cues to stimulate recollection may exacerbate the problem of suggestibility in testimony.[26] Even if (as Marin et al.'s data suggest) children are no more swayed by leading questions than adults, that they are exposed to more of them means that their testimony may be less credible. In short, while more research is needed, there is some reason to be concerned about the suggestibility of young children (perhaps up to age 7). This might be evaluated on voir dire through the use of leading questions on matters not related to the case.

CONCLUSIONS

While there are some gaps in the relevant literature, the available research in sum suggests that liberal use of children's testimony is well founded, to the extent that the

[24]See discussion *infra* of moral development; see also Melton (1980).

[25]There is some evidence that young children may be able to consider intention and other social ethical factors better than Piaget argued that they could (Austin, Ruble, & Trabasso, 1977; Darley, Klosson, & Zanna, 1979). However, there is nonetheless the weight of empirical evidence which clearly indicates that moral judgment is "indisputably developmental" (Lickona, 1976b, p. 239). Young children's moral judgments, while subject to social influence, are strongly affected by their cognitive limitations.

[26]Courts do in fact often allow attorneys great freedom in posing leading questions to children so that they might give more complete answers (Stafford, 1962)

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primary consideration is the child's competency to testify.[27] Memory appears to be no more of a problem than in adult eyewitnesses when recollection is stimulated with direct questions. Children also are no more prone to lying than adults. Data on suggestibility are less clear but seem to indicate fewer age differences than might be suspected, a finding which needs to be further investigated. Young children's ability to conceptualize complex events is more problematic, although it is possible that, with skillful examination, jurors can follow children's line of inference sufficiently to evaluate their testimony. That hypothesis is worthy of investigation, particularly given that the task of weighing children's competency is currently strictly the province of the judge.

The conclusions described here could be made more confidently if they were based on children's functioning outside the laboratory. Only Marin et al.'s (1979) investigation involved a courtroomlike task. Even that investigation involved interrogation under low stress. There are obvious ethical problems in inducing such stress. As an alternative, recall, conceptual skills, etc. might be evaluated in situations of naturally occurring stress, such as hospitalization. Experimentation might also be attempted in simulations of trials in courtrooms or simulated courtrooms.

Research is also needed on children's perception of the trial setting. No such data are available for young children (Grisso, in press; Wald, 1976). In the present context, such research would help to define the psychological demands of courtroom environments and possible effects on children's competency to testify. Such research might also be useful in preparing children for testimony, both to enhance the quality and probative value of their testimony and to reduce the stress which the legal process may induce in child witnesses.

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Chapter 10

PROCEDURAL REFORMS TO PROTECT CHILD VICTIM/WITNESSES IN SEX OFFENSE PROCEEDINGS*

Gary B. Melton

I. The Case for Reform

In recent years, attention has been given to the conflict between the rights of defendants and the needs and rights of victims in criminal sex offense cases. The entire process of investigation and trial may result in psychological trauma and embarrassment to victims, with especially distressing effects if the defendant vigorously exercises his Sixth Amendment right to confront and cross-examine witnesses against him. In so doing, defense counsel often puts the victim on the defensive by suggesting complicity or seduction by him or her.[1] The continued victimization may be exacerbated by the constitutional requirements of open trials.

These conflicts are particularly stark when the victim is a child. Children presumably are more vulnerable to psychological trauma than adults, and police interrogation, repeated interviews, and the trial itself may be particularly confusing and stressful for them.[2] Even young children, sometimes as young as age four, are often competent to testify,[3] and questions of potential trauma become particularly acute. In short, society's interest in punishing child molesters may come into conflict with its obligation as parens patriae to protect dependent minors.

Consequently, there have been essentially two proposals to introduce procedural reforms which would reduce the need for the child-victim to recapitulate the event at trial. The first involves removing or reducing the size of the audience to diminish the scariness and embarrassment of testifying in open court. The second proposal involves preventing the child from having to testify while facing the offender. When the offender is the child's parent, this issue becomes even more salient.

The purpose of this article is to review the legal and practical issues involved in such proposals, primarily in criminal cases, although juvenile proceedings will also be touched upon. Can trauma to the child be minimized without sacrificing either due process or state aims of bringing offenders against children to justice?

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II. Proposals for Reform

A. Reforms in Other Nations

There have been no systematic studies which have evaluated proposals for procedural reform to protect child victims. There have, however, been extensive changes in handling child victims of sex offenses in Israel and, to a lesser extent, in Scandinavia. Anecdotal data have been reported on the effects of these reforms, and they are worthy of some attention.

The most radical modification of standard criminal procedure has been in Israel. A statutory revision enacted in 1955[4] provides for

vesting authority in youth examiners, who are usually "professional workers who are connected in their daily work with aspects of dynamic behavior of the human mind, such as psychiatric social workers, clinical psychologists, psychiatrists, probation officers and child care workers...."[5] In any sex offense case involving a child under 14, no interrogation or testimony by the child may take place without permission of the youth examiner. In fact, the child testifies in only 14% of the cases.[6] In most instances, the youth examiner talks with the child, and statements made by the child to the youth examiner are admissible into evidence. Normally, the child does not testify and only the youth-examiner appears in court. In the United States, however, as is discussed later, the child's unavailability for corroboration and cross-examination would violate the defendant's constitutional rights. Moreover, the youth examiner's testimony regarding the child's statements would be considered hearsay in this country unless it fell into one of the exceptions to the hearsay rule. Reifen reported an impression, without supporting data, that the Israeli statute has resulted in more reports of sexual abuse because of fewer fears of harm to the child.[7]

While the Scandinavian countries have preserved defendants' rights to confrontation, they have attempted to make police procedures less stressful for the child through use of specially trained investigators.[8] Unlike the Israeli system, the Scandinavian investigators are policewomen. However, these police officers are given advanced training in psychology, and in fact in Stockholm, the special police officers are nurses. All of the child's statements to the investigators are tape-recorded with the goal of reducing the need for the child to repeat his or her story.

B. Constitutional Limitations Upon the Child's Private Testimony

In the United States, the principal procedural device used to protect child witnesses has been some variation of in camera proceedings. This has primarily occurred in civil child custody proceedings in which the child's interests arguably are paramount. It has been held permissible in a majority of states in custody proceedings to have some form of in camera testimony in which the child is privately interviewed by the judge to determine the child's preference. Such interviews usually are conducted in the judge's chambers without the parents present. Special procedures to safeguard the parents' due process rights normally are imposed, one such protection is recording the child's testimony. Some jurisdictions require consent of the parties for in camera testimony; others leave the decision to the absolute discretion of the judge, at least when the testimony is recorded so that the transcript is available for appellate review.[9]

However, in criminal proceedings in which the defendant's liberty interest is at stake, testimony in chambers would clearly violate constitutional guarantees of due process if the defendant insisted on invoking his or her right to confront witnesses and to be present at trial. In juvenile court hearings based on parental abuse, in camera testimony may also be held to violate the accused parent's due process rights, even with the parties' attorneys present.[10] However, as discussed later, psychological trauma to the child is a factor more likely to be considered in allowing in camera testimony in child protection cases.

Moreover, in camera testimony may also conflict with the fundamental constitutional principle of open trials. The general issue therefore is the degree to which the courtroom can be closed without violating either the defendant's or the public's constitutional rights. There are three constitutional doctrines bearing on this inquiry which must be balanced with the parens patriae concern for protecting the child witness: (1) the defendant's Sixth Amendment right to confrontation of witnesses; (2) the defendant's Sixth Amendment right to a public trial; and (3) the First Amendment right of the press and the public to access to the judicial process. The scope of each of these rights and their implications for special procedures in cases involving child witnesses are issues not yet settled in law. Broadly, two questions will be addressed in the following sections. First, is there a way in which the child can avoid direct confrontation with the defendant without abridging the defendant's rights?

Second, is it constitutionally permissible to hear the child's testimony while the public and/or press is excluded?

Before considering these issues in turn, it is important to note that there is considerable precedent for taking the interests of child witnesses into account.[11] In order to protect the child and to allow the child to feel more comfortable (and presumably to be more productive) in testimony, clearing the courtroom except for those persons having a direct interest in the case has been held permissible in criminal proceedings by at least two federal appeals courts.[12] Indeed, courts holding that the audience cannot be limited in criminal trials on occasion have distinguished in the dicta circumstances of those cases from cases in which children are witnesses.[13] Nonetheless, the relative weight to be given to the child witness' interests in a balancing test is far from clear.

(1) The Defendant's Right to Confrontation

a. Criminal Proceedings

In criminal prosecutions, the defendant's Sixth Amendment right to be present at his trial and to confront and cross-examine witnesses has been held to be inherent in fundamental fairness[14] and applicable to the states under the due process clause of the Fourteenth Amendment.[15] In an opinion for the Supreme Court in California v. Green,[16] Justice White identified three principles underlying the right to confrontation: the need to subject the witness to the oath; the usefulness of cross-examination in sorting out the truth, and the need for the jury to observe the witness' demeanor in order for the jury to evaluate his or her veracity.[17] Arguably, it is the need to cross-examine which is most basic to the defendant's right of confrontation. Only then can he or she challenge testimony which is misleading and damaging. Although this right is not absolute,[18] it is so basic to due process that there are few conceivable ways in which confrontation can be preserved in criminal cases without subjecting the child victim to the stress of facing the defendant.

The simplest means would be the defendant's waiver of his rights to be present and confront the prosecuting witness. While this right is potentially waivable,[19] it requires an intentional and knowing waiver by the defendant,[20] and there are probably few circumstances in which it would be in his best interests to agree to a waiver. Consequently, this option is seldom available.

b. Family Court Proceedings

In family court proceedings involving parental abuse or neglect, the accused parents' due process rights to be present at trial and to confront witnesses against them also are normally recognized. However this right is not absolute. In a New York case, the court stated that exclusion of a party may be necessary in limited circumstances, indicating

> [d]ue process varies with the subject matter and necessities of the situation. The sociolegal nature of the problems with which Family Court judges deal requires the exercise of considerable discretion....Tender years, mental health behavior in the courtroom, the need to shield some children from the emotional trauma some disclosures would be likely to produce, these are not the kind of considerations which Family Court judges must or should ignore....[21]

However, a more recent New York case held that unless the potential for harm to the child from testifying is clearly established, the accused parents' due process right to confront witnesses must prevail.[22]

As stated earlier, in camera interviews by the judge outside the parents' presence represent the majority rule in custody cases.[23] It is arguable that child protection cases are similar to custody proceedings, since the best interest of the child is equally paramount. On the other hand, it may be that parents in an abuse or neglect case have greater due process rights at stake; not only can they lose custody, but they risk a stigmatizing label of being an unfit parent and the potential of having their parental rights terminated. Thus, in camera testimony in child abuse proceedings may at least require evidence that the child is likely to suffer emotional harm in order to outweigh the accused parents' due process rights.

c. A Special Child-Courtroom and the Right to Face-to-Face Confrontation

Libai has suggested a way in criminal prosecutions of eliminating the audience, including the defendant, which he believes would preserve the defendant's right to confrontation and cross-examination without causing great stress to the child victim.[24] He advocates development of a "child-courtroom." This would be an informal courtroom with a one-way mirror behind which would be the defendant, his friends and family, and representatives of the public. The defendant could communicate with his counsel in the interview room through a "bug in the ear."

Libai's proposal obviously raises questions about the practicality of building child-courtrooms. Beyond this pragmatic question, the proposed procedural modifications raise an interesting constitutional question concerning the scope of the right to confrontation.

Assuming Justice White's analysis in the California v. Green case is accurate, it is arguable that the Libai proposal adequately safeguards the defendant's Sixth Amendment rights. The defendant would be able to observe and challenge testimony, and the lack of immediate physical proximity could be viewed as a minor inconvenience to the defendant balanced by meeting the needs of the child victim.

However, this analysis would not hold if the defendant's right to be present at this trial includes a right to be physically present. There is not much direct precedent on this point, but the available case law suggests that the right to confrontation under the Sixth Amendment may include face-to-face meetings. Early cases which developed the principle of confrontation as a fundamental due process right frequently used language mentioning the inducement to telling the truth which was provided by meeting the defendant in face-to-face confrontation.[25] However, this language was in general support of the necessity of cross-examination rather than of physical confrontation per se and may be weak precedent, in view of the inability of nineteenth-century judges to foresee technological developments permitting cross-examination and confrontation without physical presence.

There is only one reported case which by analogy is relevant to the issue raised by Libai's proposal. In a recent Eighth Circuit case involving an alleged accessory to kidnapping (United States v. Benfield[26]), an adult victim had suffered extreme post-trauma emotional distress to the extent that she had been unable to work and had required hospitalization. Her psychiatrist recommended that she not be required to testify or that "circumstances less stressful than a trial courtroom be arranged."[27] The trial court then granted the prosecution's request for a videotaped deposition of the prosecuting witness and ordered that the defendant could be "present at the deposition but not within the vision" of the witness.[28]

In accordance with the trial court's order, the victim's testimony was taken in a videotaped deposition with defense counsel having opportunity for cross-examination. The defendant watched the proceedings on a monitor and was able to halt the testimony with a buzzer so that he could confer with counsel. The witness was aware of the defendant's presence in the building.

The appellate court held that this procedure violated the defendant's right to confrontation.

> The right of cross-examination reinforces the importance of physical confrontation. Most believe that in some undefined but real way recollection, veracity, and communication are influenced by face-to-face challenge. This feature is a part of the Sixth-Amendment right additional to the right of cold, logical cross-examination by one's counsel. While a deposition necessarily eliminates a face-to-face meeting between witnesses and jury, we find no justification for further abridgement of the defendant's rights. A videotaped deposition supplies an environment substantially comparable to a trial, but where the defendant was not permitted to be an active participant in the video deposition, this procedural substitute is constitutionally infirm.[29]

The appellate court in Benfield also noted that exclusion of the defendant from a deposition potentially conflicts with his right to self-presentation.[30]

It should be noted that it is plausible that face-to-face confrontation by particularly vulnerable victims (like children) may actually diminish reliability of their testimony rather than enhance it, as the Benfield appellate court implied. While an empirical question, this assumption is not easily testable because of ethical concerns about subjecting research participants to undue stress. Nonetheless, the well-established "inverted-U relationship" between arousal and performance suggests that placing witnesses in great emotional distress would result in testimony of less probative value.[31]

Libai has made an additional proposal which raises Sixth Amendment problems. In order to minimize the time during which the child and his or her family are in limbo, Libai would require special pre-trial hearings.[32] The child would testify in the child-courtroom soon after charges were brought, with the defendant's counsel present for cross-examination. The defendant, however, would not be present. The testimony would be videotaped and shown to the trier of fact at trial.[33] In the rare circumstance in which the defense could demonstrate that new evidence had been uncovered thereafter which made the pre-trial cross-examination ineffective, the child could be asked to testify at trial. However, because the right to confrontation is so fundamental, a requirement for early depositions probably would be unconstitutional if it could be shown in any way to diminish the quality of cross-examination (presumably through lack of time for the defense to prepare adequately). Accordingly, pre-trial videotape deposition taken without the defendant's presence would probably require the defense's stipulation to the procedure.[34] In short, while the issue is not settled, the Sixth Amendment may require face-to-face confrontation at the time of trial, particulary in criminal proceedings. If so, innovative proposals reducing the stress of confrontation will probably be held impermissible.

(2) Public Trial Rights

a. Defendant's Right to a Public Trial

Even if the defendant's presence is required, there may be advantages to the child of limiting the audience so that he or she is not compelled to recount embarrassing or traumatic events in front of numerous strangers. The law is in fact more settled on the scope of the defendant's Sixth Amendment right to a public trial.[35] As noted earlier in this article, there is considerable precedent for limiting the audience in trials involving child-witnesses. The right to a public trial is a fundamental right designed to prevent judicial misconduct and use of the legal system as an instrument of persecution.[36] Public trials also allow

witnesses to bring forth evidence unknown to the parties. However, these interests are met by having present, at a minimum, the defendant, counsel, and the defendant's family and friends.[37] Thus, prosecutors may avoid child-witnesses being forced to discuss embarrassing and emotion-laden material in front of large audiences. Furthermore, if Libai's child-courtroom were held not to be violative of the defendant's right to confrontation, there would not appear to be any reason that even this small audience could not be behind a one-way mirror.

b. Public's Right to Access to Trials

In addition to the defendant's right to a public trial under the Sixth Amendment, the public has a First Amendment right to access to criminal trials (at least through the press) "absent an overriding interest articulated in findings."[38] This principle was just affirmed by the Supreme Court for the first time in a highly publicized case, Richmond Newspapers, Inc. v. Virginia.[39] In the opinion for the Court, Chief Justice Burger noted the long tradition in Anglo-American law of open trials as a means of monitoring the judicial process. He relied heavily on common law precedent dating to before the Norman conquest: "What is significant is that throughout its evolution, the trial has been open to all who cared to observe."[40] Essentially, Burger argued, open trials are basic to Anglo-American justice, and it has always been that way. Consequently, it was held that defendants could not compel trials to be closed because of the public's right to access. It is noteworthy that the concurring opinions of Justice Brennan, Stewart, and Blackmun also relied heavily on common law precedent.

(3) Closed Trials During Testimony of Child Sex Offense Victims

a. Criminal Proceedings

The import of Richmond Newspapers for attempts to protect the privacy of child victim/witnesses by closing the courtroom to the public in criminal cases is unclear. Given the Court's reliance on historical precedent, it may be that such efforts are constitutionally acceptable because courts have frequently viewed such efforts in the past as necessary to protect the witness. The Supreme Court itself recently noted in Gannett v. De Pasquale the frequency of such limited closures in deciding that the defendant did not have a constitutional right to open pre-trial hearings.[41]

In the Gannett case, the Supreme Court stated that "the tradition of publicity has not been universal."[42] The Court cited cases in which some members of the general public were excluded in cases involving violent crimes against children. Further, a number of state court decisions and state statutes in about half the states allow exclusion of the public in a variety of circumstances, including rape cases; child sex offense cases; cases where embarrassment could prevent effective testimony; where evidence is vulgar; or, where the presence of certain persons would "impair the conduct of a fair trial."[43] In Richmond Newspapers, the Supreme Court explicitly reiterated that the "First Amendment rights of the public and the press are [not] absolute."[44] In support of this statement, the Court cited Wigmore on Evidence, which lists the statutes and court decisions permitting limits upon public proceedings. The court made clear that a "trial judge [may], in the interest of the fair administration of justice impose reasonable limitations on access to trial."[45]

Such a limitation was recently upheld by the South Carolina Supreme Court in a case decided after Richmond Newspapers. State v. Sinclair[46] held that the trial judge did not abuse his discretion in excluding the public during the testimony of a nine year old victim of sexual battery. However, it is important to note that in Sinclair, the trial judge allowed reporters access to the child's recorded testimony. At least four states, Arizona, Florida, Montana, and New Mexico, have statutes specifically allowing videotaped depositions in lieu

of trial testimony of a child victim of sexual abuse.[47] The depositions must be taken in the presence of the defendant, defendant's counsel and the prosecutor. In Florida, unlike the other three states, the videotaped testimony may be taken only if there is a "substantial likelihood such child will suffer severe emotional or mental strain if required to testify in open court."[48] Moreover, a statute in New Hampshire provides that in sex crime cases involving a victim under 16, his or her testimony shall be taken in camera unless the defendant shows good cause.[49]

On the other hand, some rulings indicate that the limits of closure may be quite narrow. A stark example was a case decided a week before Richmond Newspapers in which the Kentucky Supreme Court reversed a trial judge's decision to close the courtroom to both the public and the press, and instead to release a transcript at the end of the trial.[50] In that case, the 10 prosecuting witnesses, all under age 12, were the alleged victims of sodomy. The appellate court held as follows:

> We do not quarrel with the trial judge's concern over the embarrassment and emotional trauma that could be suffered by the witnesses were they to testify in an open courtroom concerning delicate and distasteful matters. The problem, is however, that by the very nature of certain trials, civil as well as criminal, this embarrassment and emotional strain commonly occur. One can think of instances in trials involving rape, incest, paternity, child abuse, divorce, etc., when the witnesses, child and adult alike, will be greatly embarrassed and traumatized by testifying publicly. Yet this embarrassment and trauma has not been deemed sufficient to bar the public from these proceedings. Embarrassment and emotional trauma to witnesses simply do not permit a trial judge to close his courtroom to the entire public.[51]

The language of the Kentucky Supreme Court is striking. An even clearer message from the United States Supreme Court concerning the potential constraints of the First Amendment on attempts to close trials to the press in order to protect child sex offense victims. In a recent per curiam opinion in Globe Newspaper Co. v. Superior Court[52], the Supreme Court summarily vacated a decision by the Massachusetts Supreme Judicial Court upholding exclusion of the press during the testimony of three teenaged rape victims, and remanded it for reconsideration in light of Richmond Newspapers. The Massachusetts court had held specifically that the press should be excluded under a state statute closing trials for sex offense crimes against minors to all except those having a "direct interest in the trial.[53] In upholding the statute, the court cited psychological authority regarding the trauma suffered by a child victim who is, in effect, victimized again by the criminal justice system.[54] The court construed the purpose of the statute as four-fold: to encourage child sex offense victims to come forward; to preserve their ability to testify by protecting them from undue psychological harm at trial; to uphold the State's interest in sound and orderly administration of justice; and, to facilitate obtaining just convictions for crimes that perpetrators frequently have gone free.[55]

While it remains to be seen how the Massachusetts statute will be construed on remand, it seems probable that, at a minimum, blanket exclusions of the press from testimony by child-victims in criminal sex offense cases will be held to be violative of the public's right of access. On the other hand, courts may be more willing to exclude the general public than the press in criminal cases. However, the holdings

of the Kentucky and South Carolina Supreme Courts regarding release of the transcript of the child's testimony after trial reflect conflict regarding the scope of the press' right of access. Allowing the press access, either at trial or by way of a transcript, provides the vehicle for informing the public; this should satisfy the public's First Amendment right to have information regarding the judicial process.

b. Family Court Proceedings

Unlike a criminal trial, an abuse or neglect hearing in the family court seeks to protect the child and does not lead to criminal penalties for the accused parent. This factor in part explains why such hearings traditionally have been allowed to be closed to the general public. However, many states allow persons with a "proper," "legitimate," or "direct," interest to attend juvenile hearings, usually at the discretion of the judge.[56] The press normally has been considered to possess such an interest, although the judge usually exercises reasonable discretion in regard to their presence in court.[57] Thus, family court hearings are not "secret"; the fact that they are private does not deprive the public of its right to be informed since the press serves this function."[58]

III. Conclusions: Making the Present System More Responsive

While the issues are certainly not settled, there seems to be ample reason to doubt the constitutionality of attempts to alter standard criminal procedure in order to protect child victims. Benfield[59] suggests that there is little room for tampering with the defendant's right to confront witnesses. While there is considerable precedent for limiting the audience in trials involving offenses against children, developing law on the public's right of access to trials suggests that there may be little way, other than by voluntary measures, of shielding child victim/witnesses from the eye of the press.

These legal issues aside, however, there may be a more fundamental question of whether substantial procedural changes to protect children are in fact desirable in all cases. Arguably, any attempts to institute such reforms are premature. At this point, the behavioral science literature is bereft of research testing assumptions about ways in which the legal system induces and enhances trauma in child victims. Research might initially best be centered on evaluation of carefully designed demonstration projects involving, for example, special youth examiners. It may be that assumptions that reducing the audience in trials, using special examiners for interrogation, etc. will alleviate stress are invalid. Indeed it is conceivable that for some youngsters the opportunity to "have their day in court" would be cathartic and symbolically put an end to the episode in their minds.

Furthermore, there is a need for basic research on children's understanding of the legal process. At present, no such data exists for young children.[60] We do not know, for example, how young children understand the roles of an attorney and the nature of the adversary process. By examining such concepts, information might be gathered which would be useful in responding directly to children's concerns and fantasies in preparation for interrogation and testimony. It would also be useful to "debrief" children after testimony to obtain at least a subjective appraisal of the experience and the thoughts it provoked. Such data-gathering seems to be a first step in developing techniques of allaying children's anxiety while at the same time meeting the needs of the legal system. In short, we simply do not have data available to use in shaping ways of making the system, even as it is presently structured, more effective and humane. Particularly in view of constitutional requirements which may nullify any proposal which in any way compromises the defendant's right to confrontation, such efforts to make the present system more responsive to the needs of the child are clearly desirable.

Footnotes

1. L. Holmstrom & A. Burgess, Rape: The Victim Goes to Trial, in Victimology: A New Focus (I. Drapkin & E. Viano eds. 1975).

2. See generally A. Burgess & L. Holmstrom, The Child and Family in the Court Process, in Sexual Assault of Children and Adolescents (A. Burgess, A. Groth, L. Holmstrom, & S. Sgroi eds. 1978); V. DeFrancis, Protecting the Child Victim of Sex Crimes Committed By Adults (1969); Child Sexual Abuse: Incest, Assault and Sexual Exploitation, National Center on Child Abuse and Neglect, U.S. Department of Health and Human Services (Aug. 1978). The assumption of psychological harm from children's participation in trials is largely untested, however. See G. Melton & E. Lind, Procedural Justice in Family Court: Does the Adversary Model Make Sense? in Child and Youth Services and the Law (G. Melton ed. in press).

3. See generally G. Melton, Children's Competency to Testify, 5 Law & Hum. Behavior (in press).

4. Law of Evidence Revision (Protection of Children) Law 5715-1955 §4.9 Laws of the State of Israel 102 (auth. trans. 1955). For descriptions of the implementation of this statute, see D. Reifen, Court Procedures in Israel to Protect Child-Victims of Sexual Assault, in 3 Victimology: A New Focus (I. Drapkin & E. Viano eds. 1975) [hereinafter cited as Court Procedures]; Reifen, Protection of Children Involved in Sexual Offenses: A New Method of Investigation in Israel, 49 J. Crim. L.C. & P.S. 222 (1958) [hereinafter cited as Protection of Children].

5. Reifen, Protection of Children, supra note 4, at 224.

6. Reifen, Court Procedures, supra note 4, at 68.

7. Id. at 72.

8. Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 Wayne L. Rev. 977, 1014-1025.

9. See D. Siegel & S. Hurley, The Role of the Child's Preference in Custody Proceedings, 11 Fam. L. Q. 1, 42-57 (1977). But see, In the Matter of S. Children, 102 Misc. 1015, 424 N.Y.S.2d 1004 (Fam. Ct. 1980) (in camera testimony in neglect proceeding requires finding that "child would suffer a traumatic detrimental effect if compelled to testify in the respondent's presence.")

10. See, e.g., In the Matter of S. Children, supra note 9.

11. See 6 Wigmore On Evidence §1835 (1976).

12. Geise v. United States, 262 F.2d 151 (9th Cir. 1958); Melanson v. O'Brien, 191 F.2d 963 (1st Cir. 1951). Cf. United States ex rel. Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977); Aaron v. Capps, 507 F.2d 685 (5th Cir. 1975); Harris v. Stephens, 361 F. 2d 888 (8th Cir. 1966), cert. denied, 386 U.S. 964 (1967) (spectators not having a direct interest in the case may be removed to protect the dignity of testifying rape victims).

13. United States v. Kobli, 172 F.2d 919 (3d Cir. 1949); People v. Jelke, 308 N.Y.S. 56, 123 N.E.2d 769 (1954).

14. Rogers v. United States, 422 U.S. 35 (1975); Snyder v. Massachusetts, 291 U.S. 97 (1934).

15. Pointer v. Texas, 380 U.S. 149 (1970).

16. 399 U.S. 149 (1970).

17. Id. at 158.

18. The defendant may be removed from the courtroom if his conduct is disruptive. Illinois v. Allen, 397 U.S. 337 (1970); Badger v. Cardwell, 587 F.2d 968 (9th Cir. 1978); United States v. Kizer, 569 F.2d 504 (9th Cir. 1978); Carlson v. Hofstad, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977); United States v. Ives, 504 F.2d 935 (9th Cir. 1974). There are also circumstances in which testimony may be admitted as exceptions to the hearsay rule and without the opportunity for cross-examination. See Fed. R. Evid. 804 (b)(5).

19. Taylor v. United States, 414 U.S. 17 (1974); Brookhart v. Janis, 384 U.S. 1 (1966); Diaz v. United States, 223 U.S. 442 (1912); Ellis v. Oklahoma, 428 F. Supp. 254 (W.D. Okla. 1976); Heyton v. Egeler, 405 F. Supp. 1133 (E.D. Mich. 1973); Fed. R. Crim. Proc. 43.

20. Johnson v. Zerbst, 304 U.S. 458 (1938); Collins v. State, 12 Md. App. 239, 278 A.2d 311 (1971).

21. In the Matter of Cecilia R., 36 N.Y.S. 2d 317, 333, 327 N.E. 2d 812, 817-818 (1975).

22. In the Matter of S. Children, supra note 9.

23. See note 9, supra.

24. Libai, supra note 8, at 1010-1017.

25. Snyder v. Massachusetts, 291 U.S. 97, 106 (1934); Kirby v. United States, 174 U.S. 47, 55 (1899); Mattox v. United States, 156 U.S. 237, 243-244 (1895).

26. 593 F.2d 815 (8th Cir. 1979).

27. Id.

28. Id.

29. Id. at 821.

30. Id. at 821, n.8. See Faretta v. California, 422 U.S. 806 (1975).

31. See Melton, supra note 3.

32. Libai, supra note 8, at 1028-1032.

33. For discussions of the legal and practical issues in use of videotaped depositions, see generally J. Barber & P. Bates, Videotape in Criminal Proceedings, 25 Hastings L. J. 1017 (1974); J. Shutkin, Videotape Trials: Legal and Practical Implications, 9 Colum. J. L. & Soc. Prob. 363 (1973).

34. One of the state statutes providing for pre-trial depositions in rape and attempted rape cases in fact requires consent of the defendant to the procedure. Va. Code §18.2-67 (Repl. Vol. 1975). But see S. C. Code Ann. §§16-3-660, 16-3-670 (Cum. Supp. 1980) (no statutory provisions for consent by defendant to deposition); see also State v. Harris, 268 S.C. 117, 232 S.E. 2d 231 (1977).

35. In the present context, this issue is obviously limited largely to cases in which the alleged offender is an adult, in that juvenile courts generally are closed in order to protect the respondent. However, in states in which the juvenile offender has at least a conditional right to a public trial (or the public has at least a conditional right of access), the issue may still apply. See State ex. rel. Oregonian Publishing Co. v. Diez, __ Or. __, 613 P.2d 23 (1980); R.L.R. v. State, 487 P.2d 27 (Alaska 1971). See also American Bar Association Institute of Judicial Administration, Juvenile Justice Standards Relating to Adjudication §§6.1-613.

36. In re Oliver, 333 U.S. 257 (1948).

37. Id. at 272.

38. Richmond Newspapers, Inc. v. Virginia, 448 U.S. ___, 100 S. Ct. 2814, 2830 (1980).

39. Id.

40. Id. at 2821.

41. 443 U.S. 368, 388 n.19 (1979).

42. Id. 61 L. Ed. at 626-627 n.19.

43. See 6 Wigmore On Evidence §1835 (1976). Examples of states which specifically allow closing the courtroom in cases involving child victims of sex offenses are: Mass. Gen. Laws Ann. ch. 278, §16A (West 1972); State v. Smith, 90 Utah 482, 62 P.2d 110 (1936); Wis. Stat. Ann. §970.03 (4)(1971) (only preliminary proceedings). But see p. 193 infra & notes 52-55 for a discussion of a case challenging the constitutionality of the Massachusetts statute.

44. 100 S. Ct. at 2830 n. 18.

45. Id.

46. No. 21375 (S. Ct. S.C. Jan. 13, 1981).

47. See Fla. Stat. Ann. §918.17 (West Supp. 1980); Mont. Rev. Codes Ann. §§46-15-401 to -403 (1979): N. M. Stat. Ann. §30-9-17 (1978).

48. See Fla. Stat. Ann. §918.17 (West Supp. 1980).

49. N.H. Rev. Stat. Ann. §632-A:8 (Supp. 1980).

50. Lexington Herald Leader v. Tackett, 601 S.W.2d 905 (Ky. 1980).

51. Id. at 907. Such factors have also been found to be secondary to a child's duty to testify. See Riggs v. State, 235 Ind. 499, 135 N.E.2d 247 (1956).

52. 101 S. Ct. 259 (1980).

53. ___ Mass. ___, 401 N.E.2d 360 (1980); See also Mass. Gen. Laws Ann. ch. 278, §16A (West 1972).

54. Globe Newspaper, supra note 52, at 368, 369, & nn. 11-20.

55. Id. at 369.

56. See, e.g., N.Y. Fam. Ct. Act §1043 (1975); D.C. Code §16-2316 (c)(1968) and D.C. Sup. Ct. Neglect Proceedings, R. 24.

57. Advisory Council of Judges for the National Council on Crime and Delinquency, Guides for Juvenile Court Judges on News Media Relations (1965), 5-12, in Child Abuse and Neglect Litigation, A Manual for Judges, National Legal Resource Center for Child Advocacy and Protection, American Bar Association (Mar. 1981).

58. Id.

59. See discussion at notes 22-24, supra.

60. See generally T. Grisso, Lawyers and Child-Clients: A Call for Research, in Children and the Law: Theoretical and Empirical Approaches to Children's Rights (J. Henning ed. in press); M. Wald, Legal Policies Affecting Children: A Lawyer's Request for Aid, 47 Child Develop. 1 (1976).

Child Witnesses and the First Amendment: A Psycholegal Dilemma

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Abstract

There have been a number of recent proposals for procedural reforms to protect child victims in their role as witnesses. The Supreme Court's decision in Globe Newspaper Co. v. Superior Court suggests both the constitutional limits of these reforms and some circumstances in which social-science evidence is unlikely to be given weight by the judiciary. Globe is particularly interesting with respect to the latter issue, because its judgment appeared to turn on perceptions of empirical data. The Court's use of these data is analyzed, and suggestions are made for future research about children's involvement as witnesses. It is argued that attention might be better paid to making the present system more responsive to the needs of child witnesses than to attempting major procedural changes.

In recent years increasing attention has been paid to the problem of victims' being placed "on trial," especially in sex-offense cases. It is typically argued that the process of investigation and trial results in an exacerbation of psychological trauma and embarrassment. The victim often must describe and in a sense relive the traumatic event repetitively, and defense counsel may suggest that the victim stimulated or participated in the offense (Holmstrom & Burgess, 1975). This emotional fallout of the legal process may be heightened by the requirement of testimony in open court; the victim may feel on display as he or she is forced to recall painful memories, to defend against suggestions of having stimulated the offense, and to confront the defendant. This

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feeling of public humiliation may be exacerbated by the presence of the press in the courtroom and the spectre of future publicity.

These untoward side effects of the legal process take on particularly profound meaning when the victim is a child. Although there is little direct evidence, the traumatic effects of police interrogation and courtroom testimony would appear especially severe for child victims. Children are less likely than adults to have the cognitive skills necessary to organize the experience. Prosecutors and police may have special difficulty in communicating with child victims and offering them emotional support and preparation for the various steps in the legal process, including testimony. Also, to the extent that delays in the legal process result in "marking time" for the child and her family until the event can be put behind them (Burgess & Holmstrom, 1978), the process may result in a temporary plateau in the child's development. However, there may be reason to modify procedures for children's testimony even if these hypotheses as to especially traumatic effects of the legal system on child victims are invalid. The historic duty of the state as parens patriae to protect children may give special significance to whatever negative effects the legal process has on victims generally. In short, the state's interest in punishing and incapacitating child molestors may come into conflict paradoxically with its interest in promoting the healthy socialization of children and protecting them from trauma.

Starting from such a premise, there have been a number of proposals for special procedures in trials of defendants charged with sex offenses against children. Some proposals involve procedures which are supplements to, rather than fundamental changes of, existing criminal procedure. The recently enacted Victim and Witness Protection Act (1982), for example, requires the Department of Justice to develop specific

procedures to make victims more comfortable and less subject to fear or embarrassment during the legal process (e.g., separate waiting rooms; victim counseling services; specially trained law enforcement officers; involvement of the victim in prosecutorial decision making). The provision of special programs and materials (e.g., Lewis & Green wood, 1979) to prepare child witnesses for the legal process is of a similar genre. Such reforms make the present system more responsive to the needs of child victims; they do not challenge prevailing criminal procedure.

Several proposals for substantial changes in procedure are more troublesome. Generally, these proposals aim to make criminal procedures less stressful for child witnesses by (a) eliminating or reducing the size of the audience during the child's testimony and/or (b) removing the defendant during the child's testimony. Thus, for example, some states permit videotaped depositions by child victims of sex offenses to avoid the presumed trauma of testimony in open court (Arizona Revised Statutes, 1978/1982; Florida Statutes, 1979/1983; Montana Code, 1977/1981; New Mexico Statutes, 1978). At its most extreme, Israel provides by statute (Law of Evidence, 1955) for the appointment of child mental health professionals as special youth examiners whose report of the child's discussion of the offense is admissible as evidence (see Reifen, 1958, 1975, for a description of the implementation of this statute). Under Israeli law, neither open testimony nor confrontation by the defendant is required in cases of sex offenses against children.

Libai (1969) and Parker (1983) have proposed less radical procedures, which they believe are consonant with the American constitutional system. To avoid the child's directly facing the defendant or the public, the Libai-Parker proposal calls for the development of special courtrooms for children. These courtrooms would be informal (e.g., without an imposing judicial bench) and would be equipped with a one-way mirror,

behind which could be the defendant, friends and family, and representatives of the public. The defendant could communicate with his or her attorney by means of a "bug-in-the-ear." To minimize the amount of time that the child and the child's family are in limbo, the judge could order a videotaped pre-trial deposition, which would be shown to the trier of fact when the case finally went to trial. The deposition would be taken in the children's courtroom. Parker's (1983) modification of the Libai proposal also provides for prohibition of publication of the child's name and address (through use of Jane or John Doe appellations on public court records) and for potential closure of the courtroom. Closure would occur only if the trial judge found a compelling state interest in doing so in the particular case.

The American proposals attempt to strike a balance between the interests of the child and the rights of the defendant and the public. However, the privacy interests of the child victim are likely to carry less weight in a balancing test than the rights of the defendant, which are constitutionally protected and therefore fundamental. Thus, even the "moderate" reforms raise a number of constitutional issues, with respect to the protection of the defendant's Sixth Amendment right to confrontation of witnesses, the defendant's Sixth Amendment right to public trial, and the public's First Amendment right (through the press) to access to the trial process (see Melton, 1980, 1981, for detailed discussion). For example, the proposals for use of one-way mirrors or closed-circuit television with electronic communication between the defendant and counsel arguably preserve the defendant's right to confrontation by providing the opportunity for his or her indirect participation in cross-examination. However, such a procedure would fail on constitutional grounds if the Sixth Amendment requires face-to-face confrontation (Kirby v. United States, 1899, p. 55; Mattox v. United States, 1895, pp.

243-244; Snyder v. Massachusetts, 1934, p. 106; United States v. Benfield, 1979). It is likely that the right to confrontation applies as an element of due process even in civil abuse proceedings because of the potential stigma and loss of parental rights attached to a finding of abuse, although the standard for attenuating the right to confrontation in family court is likely to be lower than in a criminal trial where the Sixth Amendment applies (In re S. Children, 1980).

Preservation of the defendant's right to a public trial is somewhat less problematic. There is ample precedent for limiting the size of the audience when child victims of sex offenses are testifying (Geise v. United States, 1958; Nelanson v. O'Brien, 1951). Similar authority exists for removing spectators not having a direct interest in the case may be removed to protect the dignity of testifying rape victims (Aaron v. Capps, 1975; Harris v. Stephens, 1966; United States ex rel. Latimore v. Sielaff, 1977). The interests of the defendant in a public trial may be met by having present, at a minimum, the defendant, counsel, and the defendant's family and friends (In re Oliver, 1948). This small audience could presumably be removed from the courtroom itself and placed behind a one-way mirror so that the child need not face them.

However, the circumstances in which actual closure of the courtroom to spectators is permissible may be quite limited, as illustrated by a recent Supreme Court case (Globe Newspaper Co. v. Superior Court) (Globe III, 1982) which considered the scope of the First Amendment right to a public trial. Globe is interesting not only because of its implications for consideration of reforms in procedures governing testimony by child victims; it is also noteworthy because the holding in the case turned at least superficially on the interpretation of psychological evidence.

Globe v. Superior Court

Globe involved the test of the constitutionality of a Massachusetts statute barring anyone not "having a direct interest in the case" from the courtroom during testimony by a minor victim of a sex offense (Massachusetts General Laws, 1923/1972). The Supreme Judicial Court of Massachusetts had twice considered the Globe's objection to being excluded from a trial of a defendant who had been charged with the forcible rape and forced unnatural rape of three girls who were minors (ages 16, 16, 17) at the time of trial. Relying exclusively on an analysis of the statute in the context of the common law, the Supreme Judicial Court in Globe I (1980) held that the interests supported by the closure statute required exclusion of the press only during the testimony of the victims; exclusion during the rest of the trial was a matter of the trial judge's discretion. The court interpreted the statute as intended "to encourage young victims of sexual offenses to come forward; once they have come forward, the statute is designed to preserve their ability to testify by protecting them from undue psychological harm at trial" (Globe I, 1980, p. 369). Beyond this general concern with the statute as facilitative of the administration of justice, the court also identified a legislative intent to shield minors from public degradation.

The Globe appealed to the United States Supreme Court, which summarily vacated the judgment of the Massachusetts court and remanded the case (Globe remand, 1980) for reconsideration in the light of Richmond Newspapers, Inc. v. Virginia (1980), which had made clear for the first time that public access to criminal trials is guaranteed by the First Amendment. On reconsideration, the Massachusetts Supreme Judicial Court affirmed its earlier decision. Although acknowledging "a temporary diminution" of "the public's knowledge about trials" (Globe II, 1981, p. 781), the court held that a case-by-case determination of the propriety of closure would defeat the state's legitimate interests:

Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. Only the most exceptional minor would be sanguine about the possibility that the details of an attack may become public. An examiner would have to distinguish between natural hesitancy and cases of particular vulnerability. To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience. So, too, the families of youthful victims will be uncertain whether the reporting of a sexual assault will expose a child to additional trauma caused by the preliminary hearing as well as to public testimony at the trial (Globe II, 1981, pp. 779-780)

Globe again appealed to the U.S. Supreme Court (Globe III, 1982). The Supreme Court reversed the Massachusetts court, 6-3. Writing for the majority, Justice Brennan held the Massachusetts statute to be violative of the First Amendment, in that mandatory closure was broader than necessary to meet compelling state interests. Justice O'Connor wrote separately to emphasize her belief that the holdings in both Richmond Newspapers and Globe applied only to criminal trials. Chief Justice Burger, joined by Justice Rehnquist, dissented on the merits of the case, and Justice Stevens dissented on the ground that the issue was moot because the trial in the case at hand had been completed.

Justice Brennan began the analysis of the merits of the case by reiterating the constitutional basis of the access of the press and the general public to criminal trials, as developed in Richmond Newspapers. Having emphasized the constitutional values at stake, Justice Brennan argued that any

attenuation of the access of the press must be based on a "weighty" state interest: "it must be shown that the denial [of access] is necessitated by a compelling government interest, and is narrowly tailored to serve that interest" (Globe III, 1982, p. 2620).

The majority analyzed the state interests purported to be served by the closure statute to be "reducible to two: the protection of minor victims of sex crimes from further trauma and embarrassment; and the encouragement of such victims to come forward and testify in a truthful and credible manner" (pp. 2620-2621). Justice Brennan acknowledged the former interest--protection of the minor victim--as compelling. However, he also argued that the statute was insufficiently narrow in its scope. While there might be justification for closure of the courtroom during testimony by some minor victims, there was insufficient justification for mandatory closure. Citing Massachusetts Justice Wilkins's concurring opinion in Globe II (1981), Justice Brennan noted that some minor victims might want publicity of the trial so that they could expose the heinous behavior of the defendant; others might simply not be bothered by presence of the press. Moreover, the incremental protection gained by the victim might be quite small. Massachusetts already permitted publication of the victims' names in the court record, information available to the press.

The majority found the second state justification -- facilitation of justice in cases of sexual crimes against minors--to be without merit, in that "no empirical support" had been produced to support the assertion that the closure statute would increase reporting of offenses. Indeed, in view of the minimal shield against publicity offered by the closure statute, Justice Brennan found the "claim speculative in empirical terms, but ... also open to serious question as a

matter of logic and common sense" (Globe III, 1982, p. 2622). Moreover, even if the assertion withstood empirical scrutiny, the majority regarded it as insufficiently compelling to overcome a constitutional interest, because such a claim "could be relied on to support an array of mandatory-closure rules designed to encourage victims to come forward: Surely it cannot be suggested that minor victims of sex crimes are the only crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify" (Globe III, 1982, p. 2622). With respect to the assertion that the closure statute would improve the quality of minor victims' testimony, Justice Brennan noted that the Court has presumed openness to improve testimony. Starting from such a presumption, only a showing of improved testimony by all child victims would justify mandatory closure in his view.

The Chief Justice, joined by Justice Rehnquist, quarreled with the majority on a variety of points in Globe III. Most basically, they criticized the majority's interpretaion of Richmond Newspapers (1980) as overbroad. Perhaps getting to the crux of the disagreement, the dissenters also expressed their disgust at the result of Globe: specifically, that while "states are permitted...to mandate the closure of all proceedings in order to protect a 17-year-old charged with rape, they are not permitted to require the closing of part of criminal proceedings in order to protect an innocent child who has been raped or otherwise sexually abused" (Globe III, 1982, p. 2623).

Beyond these differences in analysis, about half of Chief Justice Burger's opinion was devoted to an attack on the majority's perception of the empirical realities. He regarded the Massachusetts statute as a rational expression of "the Commonwealth's overriding interest in protecting the child from the severe--possibly permanent--psychological damage" of testimony before representatives of the press (Globe III, 1982,

p. 2626). The Chief Justice claimed further that the reality of such severe psychological damage was "not disputed" (Globe III, 1982, p. 2626) and cited six authorities that he claimed supported such a view. With respect to the majority's allegation of the lack of empirical evidence to support the second interest alleged by the state--improvement of reporting and prosecution of sex offenses against children--Chief Justice Burger responded with a rather circular argument: only by permitting experimentation by the states can such data be generated. Such an argument carried to its logical conclusion would justify any state intrusion into a constitutionally protected zone if there might be a state interest of compelling proportion. Regardless, the Chief Justice was convinced that the "reality of human experience"--"cavalier[ly] disregard[ed]" by the majority--showed that the statute would "prevent the risk of severe psychological damage caused by having to relate the details of the crime in front of a crowd which inevitably will include voyeuristic strangers," perhaps including "a live television audience, with reruns on the evening news. That ordeal could be difficult for an adult; to a child, the experience can be devastating and leave permanent scars" (Globe III, 1982, p. 2626). Rejecting case-by-case consideration of closure, the Chief Justice asserted that the "mere possiblity" of testimony before the press would be enough to deter many parents and children from reporting sex offenses (Globe III, 1982, p. 2626).

The Use and Abuse of the Social Sciences

Globe presents an interesting example of the use and significance of social-science evidence in an appellate case. Indeed, if taken literally, had the majority found a substantially stronger link between the closure statute and the protection of child victims, the result in Globe would have been different, given the same analysis. (We shall see,

however, that no empirical evidence could have met the majority's standard.)

Moreover, the division of the Court on the interpretation of the social-science evidence is surprising, at least on the surface. The advocates of greater attention to the social sciences in Globe are not the Court's liberals but instead Chief Justice Burger and Justice Rehnquist, neither of whom has expressed much affection for the social sciences in the past (see, e.g., Ballew v. Georgia, 1978; opinion of Justice Powell, concurring in the judgment, joined by Chief Justice Burger and Justice Rehnquist; Craig v. Boren, 1976, opinion of Justice Rehnquist, dissenting).

Close examination of the Burger-Rehnquist argument in Globe III shows no new affinity for empiricism, however. First, the Chief Justice apparently made no systematic examination of the relevant social-science literature. The extra-legal authorities he cited had all been previously cited in Globe I (1980) by the Massachusetts Supreme Judicial Court, and these authorities were cited without critical analysis of their findings. Specifically, Chief Justice Burger cited six authorities in support of his assertions concerning the "devastating" trauma for child victims of testimony in open court. Two of these citations (Berger, 1977; Libai, 1969) were of non-empirical law-journal articles, and a third citation (Bohmer & Blomberg, 1975) was of an unsystematic, impressionistic law-journal "study." (In that regard, social scientists wishing to disseminate their work to legal policymakers are reminded of the need to publish their findings in journals accessible through the Index to Legal Periodicals; see Tanke & Tanke, 1979.) One of the citations was of a secondary source (Katz & Mazur, 1979), and another citation was of a report of a committee of the American Psychiatric Association (Hilberman, 1976), which made a series of assertions about the problems of child victims in the legal system without supporting data.

The only one of the treatises actually presenting data was Holmstrom and Burgess's (1978) volume on institutional responses to rape victims. Burgess and Holmstrom, a nurse/sociologist research team, pioneered in the study of victims, including minor victims, of sexual assault. Combining a counseling program with research purposes, they acted as participant-observers, and they reported rich anecdotal data. However, there are substantial methodological problems with their work. The interviews were unstructured and presumably affected by Burgess and Holmstrom's preconceptions and their counseling motive. Where quantified data are reported, they make no mention of the reliability of ratings, even though some of the categories are quite subjective. Even if one assumes that failure to recognize these limitations in Burgess and Holmstrom's work was a lack of social-science sophistication rather than an uncritical eye, the Chief Justice still can be criticized for citation of their findings as to adults' responses to the legal system. He overlooked their book on child victims of sexual assault (Burgess, Groth, Holmstrom, & Sgroi, 1978), which includes a chapter by Burgess and Holmstrom on the experiences of child victims and their families in the legal system. Rather than examine these findings, the Chief Justice assumed that "certainly the impact on children must be greater" (Globe III, 1982, p. 2626, footnote 7). Although, as already noted, such a hypothesis is plausible, it does not stand on intuition alone. Indeed, particularly for young children, there is also reason to believe that children's responses might be less severe on average than are adults. The typical case of sexual abuse is nonviolent (Finkelhor, 1979). Provided that parents and others do not overreact and that they are supportive of the child during the legal process, it may well be that the experience will carry little trauma (see also Berliner & Barbieri, 1984).

Second, the "empirical" evidence on which the Chief

Justice relied to support the state's assertion that the closure statute increased reporting of sex offenses against children was nothing more than his intuition: "the reality of human experience" (Globe III, 1982, p. 2626). It is noteworthy that the state admitted in oral argument before the Supreme Court that no evidence existed to support its claim (Globe argument, 1982). Despite the lack of data, Chief Justice Burger drew a number of unequivocal psychological conclusions, as he has in several other cases involving purported severe harm to minors (e.g., H. L. v. Matheson, 1981; Parham v. J.R., 1979; see Melton, 1983b, in press-a, in press-b, for commentary). In short, it is likely that the citation of social-science authorities was in support of assumptions already made. Put in such a light, the uncritical citation of the extra-legal authorities is unsurprising. Chief Justice Burger probably began his analysis with an a priori concept of minors as extremely vulnerable (and, therefore, properly subject to adult authority), a view he has expressed in a number of contexts (Melton, 1983a, in press-a).

Third, the use of empirical evidence which the Chief Justice recommended in Globe was fundamentally conservative in that it was intended for the purpose of supporting the rationality of state action. Particularly when coupled with the lack of critical analysis of this evidence, such use of empirical evidence is reminiscent of the first "Brandeis briefs" (appellate briefs citing extra-legal authority), which were used to establish the existence, not the validity, of social facts which might have served as the bases for legislative action (Rosen, 1972). That is, the argument was based on the existence of social-science authority which might have been used by the legislature to provide a rational basis for policy, even if the assumptions did not withstand careful scrutiny. Consequently, there was no real need for analysis of the evidence by Chief Justice Burger and Justice Rehnquist,

because the real analysis in their view concerned the legitimacy of the state's purposes, not the validity of the assumptions underlying these purposes.

Although the use of the social sciences by chief Justice Burger appears half-hearted at best, the majority in Globe seems little more enthusiastic. On its face, Jutice Brennan's analysis starts from a premise that state infringements on constitutional rights must be justified by empirical evidence indicating that the state purpose is indeed compelling and that the statute narrowly serves this purpose (i.e., that the purpose could not be served by a more narrowly drawn measure). In this regard, the majority opinion is straightforward in setting forth a strong presumption against reforms which intrude upon constitutionally protected zones. Nonetheless, on close reading of the opinion, it is difficult to imagine any social-science evidence which would have supported the existence of a compelling state interest served by a mandatory closure statute. Noting that the Supreme Court had precedents for the premise that open trials produce better testimony, Justice Brennan argued that a mandatory-closure statute could be justified only if it could be shown that "closure would improve the quality of testimony of all minor victims" (Globe III, 1982, p. 2622, footnote 26), an impossible task. Rather than raise a meaningless call for empirical evidence, the majority would have been clearer if it had simply indicated that open trials are supported by fundamental values inherent in American criminal justice and that broad attacks on this tradition will not be sustained. Moreover, the citation to earlier opinions in which the positive relationship between openness and quality of testimony had been assumed also clouds the issue. Because it is consistent with constitutional values, this statement of "fact" has taken on precedential value of its own (cf. Perry & Melton, 1984). Reliance on precedent hardly establishes the truth-value of a proposition.

Again, intellectual honesty demands reliance on the real value bases of the opinion when in fact the empirical premise is essentially unrebuttable.

In short, analysis of the debate in Globe about the merit of empirical evidence does little to promote faith that the Supreme Court will make good use of social-science data to examine assumptions about social fact which underlie its opinions. Globe does suggest the kind of case in which social-science evidence is likely to carry little probative weight. Where fundamental legal values are at issue, empirical arguments are likely to be overcome by a priori assumptions. Such a conclusion does not abrogate the need for intellectual honesty as to the real bases of judicial opinions; it does, however, suggest to social scientists areas where their work is unlikely to influence judicial decision making. There may be some instances in which fundamental interests are in conflict and the courts look to other factors to tip the balance. However, it is important to note that suh attention to empirical data is unlikely to occur in Globe-style cases. Although the right of the public to access to criminal trials is fundamental, witnesses' interest in privacy is not (Press-Enterprise Co. v. Superior Court, 1984). Moreover, empirical evidence is irrelevant to the question of whether such an interest merits constitutional protection, at least within he current framework of the Constitution. Despite the majority's call for more data in Globe, it seems clear that no data could have been sufficiently compelling to overcome the public's interest if applied to all cases.

Implications for Procedural Reform

Having considered the nature of the Globe analysis, it is important to look at its result. Returning to the issue posed initially in this article, what lesson does Globe teach with respect to the possibilities of procedural reform to protect

child victims in the legal process? The answer is clear: where the interests of child witnesses as a class conflict with the constitutional rights of the defendant or the public, the latter will generally prevail. This principle does not preclude procedural modifications in specific cases where there is compelling justification, however (cf. Press-Enterprise Co. v. Superior Court, 1984). With respect to the access of the press, for example, the Supreme Court had indicated in Richmond Newspapers (1980) that the courtroom could be closed if the trial judge determined "an overriding interest articulated in findings" (p. 581). The Court did not specify the nature of the findings required, however. This ambiguity was clarified somewhat in Globe. With respect to child victims, the Court indicated that "the factors to be weighed are the minor victim's age, psychological maturity, and understanding, the nature of the crime, the desires of the victim, and the interests of parents and relatives" (Globe III, 1982, p. 2621). The Court gave no further guidance as to the calculus to be employed in deciding whether to curtail press access in particular cases.

Presumably the Globe factors also would apply in other instances in which an individual child victim/witness of a crime other than a sexual offense seeks closure of the courtroom. If there were reasons to expect particularly profound trauma and embarrassment, closure might be justified, at least in the case of children, regardless of the crime. However, it is important to note that the existing statutory provisions in some states for procedural aberrations (e.g., videotaped depositions) all apply exclusively to victims of sex crimes. Also, the broader the class to which such procedures are applied, the stronger the justification must be.

For the longer term, the Globe holding suggests some directions for research relevant to protection of child victims. First, consistent with the case-by-case inquiry which

Globe permits, researchers might try to identify the individual and situational factors determinative of, or at least correlated with, psychological harm of open testimony. As an initial step, regression studies of the factors accounting for the reactions of child victims to the legal process at both debriefing and long-term follow-up points might provide information relevant to the decision about which cases merit some procedural aberration. Such data might also suggest situations of child victimization that particularly demand preventive intervention.

Second, Globe indicates that broad procedural reforms to protect child witnesses are unlikely to pass constitutional scrutiny. Consequently, researchers might better spend their energy studying ways in which the present system might be made more responsive. At a minimum, research is needed to identify children's perceptions of the nature of the criminal process, the roles of the attorneys, and so forth. Such data are lacking even for "normal" children without any special contact with the legal system (Grisso & Lovinguth, 1982). In the present context, systematic understanding of children's experience would seem to be a prerequisite to preparing children of various ages and backgrounds for the legal process. Attention needs to be given to children's understanding of the range of steps in investigation and prosecution of alleged offenders against children, not just the trial phase.

Indeed, reports of child sexual abuse rarely reach a criminal trial. Rogers (1980) tracked 261 cases over a two-year period in the District of Columbia in which the police had been called on a complaint of sexual abuse of a child. Eighty-five percent (223) of the cases were referred for prosecution. Warrants or custody orders were denied by the prosecutor in one-third (32 adult and 41 juvenile) of these cases, most commonly because of a lack of corroborating evidence. Of the cases which ultimately went to court during

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the period of the study, 28% (2 adult and 22 juvenile) were dismissed, and a guilty plea was obtained in 62% (21 adult and 32 juvenile) of cases. Thus, only eight cases actually went to trial, and five of these cases were in closed juvenile delinquency proceedings. Although the data from a single jurisdiction may be unrepresentative, there is reason to believe that the national probability of sexual abuse cases reaching a criminal trial is even lower. Plea bargaining is ubiquitous in most jurisdictions (Department of Justice, 1983). Moreover, authorities may choose to file civil child abuse complaints instead of criminal charges, unlike the apparent practice in the District of Columbia.

Both the vacuum in relevant data (but see Burgess & Holmstrom, 1978; DeFrancis, 1969) and the infrequency of open testimony by child victims suggest finally that attempts at substantial procedural reform are premature. As indicated above, even basic descriptive information on children's responses to attorneys--and vice versa--are lacking. Moreover, the assumption that open, confrontational testimony is traumatic for child victims of sexual offenses has yet to be validated. At least for some child victims, the experience may be cathartic (Berliner & Barbieri, 1984; Pynoos & Eth, 1984; Rogers, 1980); it provides an opportunity for taking control of the situation (cf. Melton & Lind, 1982) and achieving vindication. Particularly in view of the constitutional values at stake, would-be reformers have an obligation to go beyond conventional wisdom and to show that reforms are both needed and likely to be beneficial.

The reasoning of the Supreme Court in Globe would have been more elegant had it limited its analysis to the breadth of the public's constitutional right of access to minimal trials. Once that rght was found applicable, the evidence needed to establish a compelling state interest in closing trials involving child victim-witnesses was much weightier than the

scant psychological research literature currently available on the topic. That is not to say that psychologists have no role in facilitating the protection of child witnesses. Rather, the task should be viewed as one of incremental research and reform, rather than broad attack upon constitutionally protected interests.

The most effective strategy would be to identify special vulnerabilities of child witnesses having particular psychological or demographic characteristics and then to test specific interventions or procedural changes to reduce trauma or foster adaptation in those groups. The problem is an ecological one in the strictest sense (cf. Bronfenbrenner, 1974). It involves the interaction of the developing child's psychological characteristics with various legal procedures and other aspects of the situation (e.g., perceived parental attitudes). For some children, it may be that minor interventions (e.g., acquainting the child with the physical layout of the courtroom; a friendly word from the judge) will have significant effect on both the quality of the child's testimony and the level of stress experienced by the child. Without attention to such specific relationships between psychosocial variables and legal procedures, global assertions of the harm of the latter are unlikely to provide information probative for legal decision making or useful for clinical prevention.

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Footnotes

[1] Chief Justice Burger may have overstated the limits of privacy in delinquency proceedings. In states in which the juvenile respondent has at least a conditional right to a public trial, or the public has at least a conditional right of access, open delinquency proceedings may still be possible (ABA/IJA, 1980, §§ 6.1-6.13; R.L.R. v. State, 1971; State ex rel. Oregonian Publishing Co., 1980). Where privacy of delinquents has conflicted with the constitutional rights of the press or of criminal defendants in criminal trials, the privacy interest has been outweighed (Davis v. Alaska, 1974; Oklahoma Publishing Co. v. District Court, 1977; Smith v. Daily Mail Publishing Co., 1979).

[2] In that regard, care must be taken to ensure that the reforms are not themselves stress-inducing. For example, the federal Victim and Witness Protection Act (1982) and similar victim-protection legislation in some states require the preparation of a victim impact assessment as part of the pre-sentence investigation. The required scope of the assessment -- psychological, medical, social, economic -- is such that victims might ultimately be placed under greater scrutiny than offenders, even though the purpose of the assessment is to consider factors relevant to restitution and retribution for the victims.

APPENDIX

Additional Statements and Views

TESTIMONY PRESENTED

TO

JUVENILE JUSTICE SUB-COMMITTEE

"CHILDREN'S TESTIMONY IN CHILD SEXUAL ABUSE CASES"

PRESENTED BY:

JOYCE N. THOMAS, R.N., M.P.H.
CARL M. ROGERS, Ph.D
DAVID LLOYD, J.D.

DIVISION OF CHILD PROTECTION
CHILDREN'S HOSPITAL NATIONAL
MEDICAL CENTER

Senator Specter, and other members of the Juvenile Justice Subcommittee, I want to thank you for the opportunity to testify before you on the issue of children's testimony in child sexual abuse and molestation cases. I am Joyce Thomas, Director of the Division of Child Protection of Children's Hospital National Medical Center, located here in Washington, D.C. Accompanying me today are Dr. Carl Rogers, Associate Director of the Division and David Lloyd, Division Legal Counsel. Children's is a private, non-profit pediatric hospital and we serve as the hospital's primary program addressing the health, mental health, and social services needs of abused, neglected, and sexually-victimized children.

Since 1978, when we first began providing specialized services to sexually-victimized children and their families we have provided services to over 1200 children from the metropolitan area who have presented with a suspicion of sexual victimization. We have provided consultation on more than 1000 additional cases. The children we have seen range in age from 3 months to 18 years; one-fourth of our victims have been boys. Only about 1/4 of our cases involve a parent or parental figure as the alleged offender --- however, as in other settings, the vast majority of offenders are found to be individuals well-known to the child and his or her family, including extended family members, babysitters, neighbors, and so forth.

In addition to our direct work with children and their families, the Division strives to improve our collective abilities to both prevent sexual victimization of children and effectively intervene when such abuse occurs. To these ends the Division has implemented a variety of programs, including: a prevention-oriented educational program for elementary school children; an outpatient treatment program for juveniles who sexually abuse children; three national conferences on child sexual victimization (including the Third National Conference held April 26-28 of this year); over 250 training workshops and

conferences for professionals from virtually every discipline; and close cooperative agreements and relations with elements of the law enforcement, justice, and public child protective services systems. In 1981 the sexual abuse intervention and treatment program (then known as the Child Sexual Abuse Victim Assistance Project) was designated an Exemplary Project by the National Institutes of Justice, Department of Justice.

Since our program began, we have had extensive involvement with both civil and criminal court prosecution of child sexual abuse cases within the D.C. Superior Court . We are acutely aware of the impact that both investigatory and judicial procedures can have on the emotional and psychological well-being of these children and their families. These processes often place a tremendous burden on the child victim. Issues relating to the child's credibility and competency as a witness become paramount when judicial action, particularly criminal prosecution, is contemplated. All too often, children are perceived as either lacking credibility in their testimony or not meeting minimal standards of competency to testify --- the result is that in many cases no legal action ensues. In the remainder of our testimony we would like to address the following issues: credibility and competency of child witnesses, impact of the court proceeding on child victims, and, specific concerns in the District of Columbia.

CREDIBILITY AND COMPETENCY OF CHILDREN ALLEGING SEXUAL ABUSE

Although complainant credibility and competency of the child to testify are seperate issues, we have chosen to treat them jointly here because, in our experience, the problems are similar. While both credibility and competency are legitimate areas of judicial inquiry, in our experience it is during the process of screening for prosecutorial merit that most cases are rejected on these grounds.

In our experience, very few children (2.7%) fabricate allegations of sexual abuse or molestation; i.e., their complaints are credible. Those few instances we have encountered where the veracity of the child's complaint was questionable have been in situations either involving a custody dispute where the child has been prompted to make an allegation or situations involving an adolescent who has invented a story to excuse some other area of misbehavior. More commonly, it is either due to the bizzarre nature of the child's allegation, or a lack of understanding of normal developmental processes, that prosecutors deem the child's complaint not credible. First, a child's allegation may be rejected or deemed questionable merely because either the circumstances or the child's behavior are perceived as unbelievable. It is generally the perception however, rather than the allegation, which is in error. Many cases coming to our attention and the attention of others incorporate truly bizarre and strange elements. For example, in one case the offender played games with the children of pretending to bake them in the oven (he would physically put them in the oven) before engaging them in oral sex. In general, one cannot assess credibility based upon a general notion of plausibility without extensive experience in dealing with these cases.

It is also unfortunate that all too often the child's credibility is questioned due to a failure to adaquately understand the child's account within the context of normal developmental expectations: the child's complaint, and particularly the child's b avior are seen as unlikely to be true because the individual assessing credibility is applying adult standards and adult reasoning to the situation. A child's cognitive, emotional, and social growth occurs in sequential phases of increasingly complex development. Preconceptual, concrete, and intuitive thinking in

young children gradually develops toward comprehension of abstract concepts. Time and space begin as personalized notions and only gradually are identified as logical and ordered concepts. The young child's behavior is spontaneous, outgoing, and occasionally explosive with few internal controls. As the child grows he/she develops internal controls and establishes a sense of identity and independance.

In our work we have found it to be of critical importance to attempt to understand the child's allegation within the context of his/or her developmental level. In general, we attempt to assess credibility by looking at the following factors:

First, does the child describe acts or experiences to which he/she would not have been normally exposed? For example, a six year old is not normally familiar with adult erection or ejaculation. Terminology is often a clue as well, with most children needing to describe the experience in terms consistent with their current cognitive understanding --- for example, many children describe ejaculation in terms of "wetting on me" or often will have difficulty differentiating between vaginal and anal openings. While the description of circumstances, means of inducing compliance, etc., which are consistent with typical cases can help affirm credibility, the obverse is not necessarily true.

Second, it is important to understand the disclosure process. How, and under what circumstances did the child tell someone? Often the mode of disclosure serves to enhance the child's credibility -- for example the child who initially confides in a playmate who later discloses. Are there any identifiable motives for lying? If so, what are they?

Third, how consistent are the basic elements of the child's account? What pressures exist for the child to change his/her allegation? Are inconsistencies legitimately attributable to the child's developmental status or to external pressures to recant, or do they reflect untruthfullness?

Finally, if corroborative information or findings exist, are they consistent with the child's report? While consistency may enhance comfort regarding the child's credibility, it is important to recognize that failure to find corroboration need not mean that the essential elements of the child's report are false. Children, particularly young children, can have a great deal of difficulty understanding and accurately reporting the details of sexual contacts with adults, leading to confusion over such issues as whether penetration or ejaculation occurred.

Closely related to the issue of credibility is the issue of competency to testify. Again, in our experience, the primary impact of this concern is in the screening of cases in terms of prosecutorial merit rather than as an issue in an actual court proceeding. The issue of competency works primarily to the detriment of the very young complainant. While over 20% of cases involving a child complainant over the age of five years ultimately result in a conviction, this figure is only 6% for cases involving children under the age of six years. Most of these cases are screened out at either the investigatory stage or at the papering stage due to concerns regarding the child's competency to testify. The existing presumption places the burden of proof of competency to testify in cases involving young

children on the prosecution, with the primary effect of making prosecutors more reluctant to bring these cases to trial. The additional general cautionary instruction to trial juries regarding the reliance to be placed on testimony of children further "stacks the deck" against the young complainant.

In our experience, we find that most children over the age of three are competent to testify, if by competency we mean the ability to distinguish truth from falsehood, to understand the meaning of the oath, and to be able to comprehend and give intelligent answers to questions posed, provided that such questions are phrased in accordance with the child's general level of cognitive and social development. It is primarily in this latter area that concerns regarding the child's competency to testify emerge. These concerns are for the most part based upon our insistence that children be judged essentially according to adult standards of comprehension, rather than upon any genuine deficit in the child's abilities. In particular, given the concrete nature of pre-operational cognitive processes in young children, they have difficulty understanding questions based on abstractions rather than actual behavior or events (e.g., "Did you consent?" versus, "Did you tell him to stop?"). Prosecutors, due more to lack of knowledge of normal child development and behavior than to any conscious bias, often erroneously presume the child to be incompetent merely because the child has not yet attained the level of cognitive development which supports abstract reasoning.

We believe that far too many cases of child sexual abuse and molestation are not prosecuted due to concerns regarding the child's credibility and/or competency. To address this problem we would propose the following recommendations:

1) State and local jurisdictions should be encouraged to establish vertical prosecution for all child sexual abuse and molestation cases. Such vertical prosecution would allow a greater level of contact with the child victim over time to assess credibility and competency; it would also reduce the likelihood of cases being dropped due to differential assessment of credibility and competency by different prosecutors at different stages of the prosecutorial process.

2) Where feasible, state and local jurisdictions should be encouraged to develop special prosecutorial units to handle all child sexual abuse and molestation cases. Such units would benefit from on-going experience in the assessment of credibility and competency of child complainants, leading to improved decision-making in these areas. It is unreasonable to expect the prosecutor who has handled only one or two such cases to be highly skilled in such assessments.

3) Prosecutors should utilize the services of child mental health professionals in assessing the credibility and competency of child complainants. Ideally, such professionals would function as an integral part of the prosecutorial team, not as individuals ordered by the court to psychiatrically evaluate the complainant.

4) Formal training should be made available to prosecutors which stresses normal child developmental issues as they relate to both competency and credibility of child complainants.

5) The general cautionary instruction to juries regarding child witnesses should be abolished. This instruction is prejudicial to the child complainant and serves to inhibit prosecution of child sexual abuse cases.

6) The presumption of incompetency of young complainants should be eliminated due to its chilling effect on prosecutorial decision-making.

7) Experimental approaches, consistent with constitutional restraints, which enhance the child complainant's ability to provide competent testimony, should be encouraged. For example, the use of experts trained in child development to actually rephrase and present prosecution and defense attorney questions to the child witness might prove beneficial. Precedents established in other areas where communication presents a difficulty (e.g., the use of sign language and foreign language interpreters) would suggest that no insurmountable legal barriers to such approaches exist.

THE IMPACT OF COURT PROCEEDINGS ON CHILD VICTIMS

Both investigatory and judicial proceedings that a child victim must participate in can have a detrimental impact on the child's mental health and emotional well-being. In fact, they may create a "second victimization" of the child. In the following sections we would like to briefly address some of the common practices and procedures which heighten this detrimental effect.

First, the delay inherent in the stages of due process routinely means that the child cannot put the event out of mind and proceed with normal developmental issues. Instead the child is forced to remember, in excruciating detail, the events surrounding his or her sexual victimization as repeated interview and practice sessions with the prosecutor continue. While some delays are inherent to duee process, others are avoidable. Defense requests for continuances are routinely granted with no thought of the child victim's interests in a speedy trial. Currently, in the District of Columbia it takes one year for a case to proceed to trial --- for a six year old this represents waiting one-sixth of his or her life. We have had one case where the trial occurred over two years after the initial report.

Second, the uncoordinated approach of the legal system to investigation and preparattion exacerbates the child's problem with delays. Typically the child must disclose initially to a parent, physician, police officer or detective -- later the same information may be required from the child by the prosecutor, a grand jury, and at trial. In our experience it is not uncommon for a child to have to repeat the initial account of his/her victimization at least four or five times excluding actual trial proceedings. The apparent necessity of all parties to receive their information "first hand" both increases stress for the child and leads to additional delays.

A third problem has to do with pretrial appearances on the part of the child victim. Some states require all crime victims to testify at a preliminary hearing instead of using hearsay testimony from the investigating officer. Most states require the child victim to testify before the grand jury; the Criminal Justice Section of the American Bar Association has proposed the virtual elimination of hearsay testimony before grand juries. Yet it is extremely stressful for a child to tell embarrassing and painful details to two dozen adult strangers, especially when the child's parents or other trusted individuals are not permitted to accompany the child.

Another problem has to do with the lack of consideration that the daily schedule of legal proceedings shows to children. Typically the child is commanded by subpeona to appear at court at 8:30a.m.

and must sit and wait in a prosecutor's office or barren waiting room until the testimony starts --- which may not be until afternoon. That is the time that most young children are fatigued and take naps or get recess breaks for physical activity. Instead, the child victim must then marshall all of his or her mental faculties to concentrate on the questions of the prosecutor, defense attorney, and judge.

The constitutionally required confrontation with the defendant and cross-examination can be extremely stressful to child victims. These children have been threatened with harm if they tell anyone. The offender may have been deliberately visible to them during the pretrial release period and frequently sends threatening looks or makes threatening getsuras while seated at the defense table. We have had a father interrupt his daughter's testimony to call her profane names --- we have also had a defense attorney insinuate that a 15 year old wanted to be raped because she was wearing a red dress and smiled at the defendant, and that a 12 year old incest victim was promiscuous.

The dominant feature of criminal prosecutions is a lack of respect for the victim's privacy. We have had defense lawyers attempt to subpeona the child's counseling records. Even if the defendant pleads guilty, the prosecutor usually recites a summary of the potential testimony to all the spectators in the courtroom instead of submitting it in writing or stating it at the bench. One can imagine the lack of privacy that would result from the proposed televised proceedings of trials involving child sexual abuse victims.

Sentencing practices also often have detrimental impacts on child victims. Most jurisdictions, including D.C., do not routinely prepare victim impact statements as part of the sentencing proceeding, so the child's concerns for justice are overlooked. We have had cases where the child victim adamantly wanted the defendant imprisoned, but the prosecutor had already plea-bargained away the right to say anything at sentencing. We have also had a few cases where the child wanted the offender to receive treatment due to a family relationship but the prosecutor argued for incarceration. These practices do little to convince the child that justice has resulted.

In light of the above, we would propose the following:

1) Prosecutions involving child victims should be given priority in scheduling and limits should be placed upon the number and length of continuances granted.

2) Approaches relying upon videotaping or audiotaping of children's recounting of incidents should be used more frequently to reduce the frequency with which children must repeat the details of their victimization.

3) In grand jury proceedings an exception to the preference for direct testimony should be granted, or children should be allowed to be accompanied by trusted adults to the proceeding. In pretrial hearings, hearsay evidence should be admissible in order to exempt the child from testifying in these proceedings.

4) A testimonial privilege should be granted to sexual assault counselors and other mental health care providers treating child victims, and televised proceedings should be banned.

PROBLEMS SPECIFIC TO THE DISTRICT OF COLUMBIA

In closing, we would like to briefly address some particular problems in the District --- these problems may or may not affect other jurisdictions. First, we still have the requirement in the District that the child's testimony be corroborated. The City Council has just introduced legislation to revoke this requirement imposed by the D.C. Court of Appeals. The corroboration requirement is the reason for 65% of the prosecutors' refusals to proceed in both criminal and delinquency cases.

Second, there is confusion in the District as to whether the federal "Victim and Witness Protection Act of 1982" applies to proceedings in D.C. Superior Court. In particular, that Act's, "Federal Guidelines for Fair Treatment of Crime Victims and Witnesses in the Criminal Justice System" have not yet been fully implemented. We would recommend that the confusion about the applicability of the Act be ended through either D.C. City Council or Congressional legislation.

In conclusion we would like to once again thank members of the Subcommittee for affording us this opportunity to testify on this important and timely issue. We recognize that much more could, and should be said regarding the specific impacts of court and investigatory proceedings on child victims and their families. Time limitations have however precluded a more thorough discussion. Working together we can all ultimately ensure that children who are victims of sexual crimes receive compassionate and humane treatment within the law enforcement and judicial systems, and perhaps more importantly that they are afforded equal protection and access to justice under the laws of our nation.

CHILD SEXUAL ABUSE AND THE COURTS: PRELIMINARY FINDINGS

Carl M. Rogers, PhD

Sexual victimization of children, including incest, rape, and other forms of sexual molestation, constitutes a social problem of major proportions in the United States. Estimates regarding the incidence of such sexual victimization vary greatly depending upon the study setting, the definitional criteria, and the methodology used for collecting such information. Most studies however would suggest that perhaps 200,000 to 400,000 children are sexually victimized every year in the United States (American Humane Association, 1968; Chaneles, 1967; Gagnon, 1965). Some retrospective studies would suggest that the incidence is higher still with one of every five girls and one of every ten boys (Finkelhor, 1979) or one of every three children (Landis, 1956) being sexually victimized at least once during their childhood.

Sexual victimization of children constitutes a major social problem not only due to its high frequency of occurrence but also due to its overall impact on the child victim and her or his family. Studies suggest that sexual victimization as a child may be related to later difficulties in psychosocial adjustment including drug abuse (Benward & Densen-Gerber, 1976), juvenile delinquency (Halleck, 1962), juvenile prostitution (James & Meyerding, 1977), adult clinical depression (Summit & Kryso, 1978), and similar difficulties. In addition, numerous reports attest to the immediate deleterious psycho-social effects of such victimization on children (e.g., Forward & Buck, 1978; Bach & Anderson, Note 1; Burgess & Holstrom, 1978; Greenberg, 1979; Peters, 1976; etc.).

In addition to the trauma of victimization itself, mental health professionals have become increasingly concerned about the potential for "secondary victimization" of these children as the result of societal intervention efforts. Particular concern has been focused

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upon the possible negative impact of criminal justice procedures which have been frequently seen as both increasing the degree of emotional distress experienced by the child victim and decreasing the likelihood of either offender conviction or other successful resolution of the problem (cf., Burgess & Holstrom, 1978; Davidson & Bulkley, 1980; Kirkwood & Mihaila, 1979; Stevens & Berliner, 1980). Although original concerns focused primarily on police and prosecutorial sensitivity in handling of these cases, recent attention has focused upon deficiencies or problems inherent in the adversary nature and constitutional structure of the American criminal justice process, particularly the rights to open confrontation and cross examination of witnesses or complianants in a public hearing (e.g., Davidson and Bulkley, 1980; Libai, 1969). The perceived degree of trauma visited upon the child victim by the court system and constitutional barriers to substantial change of this system have led some legal experts to conclude that, at least in intrafamily cases, court action should be only taken when it can be agreed that the child will emerge from the process better than she entered it and when it is the least detrimental alternative available (Davidson & Bulkley, 1980).

Such a standard for proceeding with court action seems ill-advised. First, it is difficult, if not impossible to predict with any reasonable certainty the impact of the court process on the child victim. Too many factors are beyond the control of the prosecution and unknowable until court action has actually commenced, such as behavior of the defendant during the proceedings, number of defense-requested continuances which will be granted, the style of cross-examination, and so forth. Second, this approach requires consensus between prosecutor, social worker, and other involved professionals—such consensus is difficult to achieve on such a conjectural issue. Third, the standard would suggest that court action would not proceed even when court action would neither help nor hurt the child. Finally, and perhaps most importantly, the approach recommended by Davidson and Bulkley allows little consideration to the wishes of the victim regarding whether to proceed with court action.

Examination of court processing of child sexual abuse cases in the District of Columbia, however, would suggest that while limitations and procedural barriers do exist, the realitiesof criminal justice handling of these cases are not nearly as bleak or detrimental as often

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portrayed (Conte & Berliner, in press). Cases handled by the Special Unit of the Child Protection Center (CPC-SU) of Children's Hospital National Medical Center (Washington, D. C.) since early 1978 have been followed as they progress within the legal/judicial system. Preliminary results would indicate that while criminal justice involvement may ultimately result in exposure of the child victim to the full impact of an adversary judicial system, such exposure is in fact rare and not necessarily excessively traumatic in nature. Parenthetically, these findings are somewhat depressing in terms of the relative infrequency with which prosecutorial actions result in offender conviction.

Child victims seen by CPC-SU (based on 1978 and 1979 cases) range in age from 6 months through 17 and one-half years, with a mean age of 8 years and 8 months. Twenty-nine percent of these children are boys. Slightly over 60 percent of these cases involve what we consider a more serious form of sexual abuse (i.e., vaginal or anal intercourse; oral sodomy). Forty-seven percent involve multiple offenses over time. Alleged offenders are almost invariably male (97%); forty-one percent are members of the child's immediate or extended family (23% are parents or parent surrogates).

Of 261 police cases tracked through the criminal justice system, 223 (85%) were forwarded to prosecutors; the remainder were either considered unfounded cases (N = 8) or cases with continuing investigation (N = 25) or cases closed through arrest on a different charge (N = 5). Ninety-six of the forwarded cases (43%) involved adult suspects; the remainder were cases with juvenile offenders.

Of the 223 cases forwarded for prosecution, four percent (N = 7 adult and 3 juvenile) were dropped because the family (i.e., parents) refused to press charges; most of these were cases involving extended family members as the abusers. Thirty-three percent (N = 32 adult and 41 juvenile) exited from the system because the arrest warrant or custody order (juvenile offenders) applications were denied by prosecutors. An offender was arrested in 63% of the cases forwarded for prosecution (N = 57 adult and 83 juvenile). In over fifty percent of those cases where a warrant or custody order application was denied the stated reason was lack of corroborative evidence. The second most common reason for prosecutors denying arrest applications was a lack of consistency in the victim's story over time (12%).

Twelve percent (N = 3 adult and 14 juvenile) of all cases where

an arrest was made (N = 140) were "no papered" (i.e., not formally charged). An additional eleven percent (N = 15 adult) of these cases were not indicted by the grand jury. At the time of this analysis, three cases were still awaiting a grand jury hearing, and nineteen (9 adult and 10 juvenile) were awaiting trial; eighty-five cases (N = 26 adult and 59 juvenile) had "gone to court."

Twenty-eight percent (N = 2 adult and 22 juvenile) of those cases going to court were dismissed, usually at the request of prosecution. Sixty-two percent of all cases going to court resulted in a guilty plea (N = 21 adult and 32 juvenile, including 5 consent decrees). A total of eight cases (9%; N = 3 adult and 5 juvenile) actually went to trial; of these, all but one (an adult offender) resulted in a conviction. Based upon the results presented above, if you are a victim of sexual abuse whose case has been forwarded for prosecution in the District of Columbia, the odds are:

—two to one that the offender will be arrested
—slightly less than one in three that the offender will be convicted
—less than one in eight that you will have to face a grand jury
—less than one in twenty that you will have to testify at trial
—less than two in one hundred that you will have to testify in open (i.e., adult) criminal trial

These findings, although somewhat discouraging regarding likelihood of conviction, are encouraging in other respects. They clearly suggest that having to face the potential trauma of having to testify in open court and undergo cross-examination is the rare exception rather than the rule. Second, the conviction rates themselves, although substantially less than the two-thirds of all felony arrests resulting in conviction in the District of Columbia in 1978 (Joint Committee on Judicial Administration in the District of Columbia, Note 2), are substantially higher than the 22% of arrests leading to conviction for sexual offenses against children (excluding exhibitionism) in the District of Columbia from 1971 to 1975 reported by Williams (Note 3).

In addition to the data presented on processing of adult and juvenile criminal proceedings, data are recorded on forty-four cases forwarded for family court action under the District of Columbia's Prevention of Child Abuse and Neglect Act (these were primarily

cases involving parent or caretaker abusers). Of these forty-four cases, 10 (23%) were not petitioned (i.e., "no papered") by prosecutors. Of the thirty-four petitioned cases, six(18%) were dismissed. At the time of analyses, five cases were still awaiting court action. The remaining 23 cases were all resolved through parental stipulation of the facts rather than an adversary hearing. Two-thirds of these cases (i.e., those resolved) resulted in the placement of the child in foster care with the remaining one-third remaining in the home under protective supervision.

Discussion

The findings presented here would suggest that, at least in regard to District of Columbia cases, concerns expressed by others regarding the impact of adversarial court proceedings on child victims are somewhat misplaced primarily because so few children actually have to testify in court. Of those that must testify, most testify in juvenile court without the publicity attendant with an adult criminal proceeding.

That a relatively large proportion of forwarded complaints are dropped due to lack of corroboration is not particularly surprising in that the District of Columbia, through judicial precedent, remains one of the few jurisdictions in the U.S. which maintains a special corroboration requirement for minor (i.e., juvenile) complainants in rape and other sexual victimization cases. It is interesting to note that while other federal courts have held that no special corroboration requirement is necessary with minor complainants (e.g., *United States v. Bear Runner*, 1978), the District of Columbia Court of Appeals (part of the federal court system) has ruled otherwise. Currently, 29 states have abolished the corroboration requirement in all sexual assault cases, while four retain it for all child victims; the remaining states impose corroboration requirements under special circumstances (Davidson and Bulkley, 1980). Although Leahy (1979) has urged the retention of a special corroboration requirement in intrafamily cases, in general it appears that the trend of the last decade is to remove this special condition from child complainant cases as it has already been removed from adult complaint (i.e., adult rape) cases.

The remaining jurisdictions still requiring special corroboration of the child victim's complaint highlight the somewhat schizoid view of

child victims generally held by the legal community. On the one hand, special procedures or protections for the child victim in the court process are resisted on the grounds that child victims of sexual offenses do not constitute a special class apart from other victims. On the other hand, many jurisdictions impose specific procedural barriers to treatment of the child victim as if he or she were an adult. In addition to special corroboration requirements, these barriers include; the use of lie detectors and psychiatric examinations as means of assessing complainant credibility in some jurisdictions (Legrand & Chappell, Note 4); permitting introduction of the defense that the child victim was of "unchaste" character in at least six states (although prior victim sexual behavior is no longer considered pertinent for adult victims except to the extent it sheds light on the issue of consent with a particular defendant; Children's Rights Report, Note 5); and, the almost universal prosecutorial practice of declining complaints initiated by minors unless the minor's parents are also in favor of prosecution (or the alleged offender is the parent).

Although our experience is that few child victims actually end up having to testify in court, it is true that for those who do the experience can be traumatic—we have also found, however, that the court proceeding can have beneficial outcomes for the child. Children, like adults, often have strong feelings regarding their victimization and want the offender to be punished for his wrongdoing. Court proceedings are the only way that the victim can legally seek retribution against the perpetrator. Older children in particular often have a strong sense of social responsibility and will choose to proceed with prosecution even though it may be stressful in the belief that they are helping to protect other children from being victimized. In many instances, court proceedings also serve to enhance the child's sense of personal vindication—others are treating the child's victimization as a serious matter; are tangibly expressing their trust and faith in the child's story. Bohmer (1974) in a survey of judicial opinions found that while 84% of judges responding felt that it was traumatic for child rape victims to testify, fully one-half of these judges also believed that procedural changes could be made to help reduce this trauma. Specific recommendations included private hearings, greater reliance on depositions, and clearing the courtroom of all but involved parties. Currently, three states (Arizona, New Mexico, and Montana) allow videotaping of the child victim's testimony (including cross-examination) with the defendant and his

attorney present for later replaying in the court and at least two other states (Minnesota and Massachusetts) allow exclusion of the public in child sexual assault cases. Similar procedures, if adopted elsewhere would substantially reduce the possibly traumatic impact of the courtroom proceeding on these children.

Finally, two additional constitutionally acceptable modifications of the court process could substantially reduce the portential for trauma to child victims participating in the court process. First, it should be established as routine procedure that either the parents of child victims, or other supportive persons of the child's choice be allowed as a matter of course to be present in juvenile court proceedings when the child must testify. It is somewhat ironic that the juvenile court in the interest of minimizing the deleterious impact of its proceedings on the juvenile offender often enhances the stress placed on the child victim by barring all but witnesses from the proceeding.

Second, there appear to be no constitutional barriers to greater reliance upon hearsay evidence rather than actual testimony at stages prior to trial. In the District of Columbia, hearsay evidence is routinely allowed in these cases in lieu of testimony at the preliminary hearing but not in the Grand Jury proceeding. In some jurisdictions the child victim is routinely expected to testify at all three proceedings (i.e., preliminary hearing, grand jury, and trial). Acceptance of hearsay evidence in place of formal testimony for all stages prior to actual trial would further limit the number of times a child victim is required to give formal testimony. In addition, given the propensity for cases to either be dismissed or resolved through pleas, use of hearsay evidence might totally obviate the need for the vast majority of child victims to publicly and formally testify.

Well-intentioned yet misguided concerns for the safety and well-being of child victims of sexual assault have led many to conclude that initiation of court proceedings in cases of child sexual victimization pose too great a risk of psychological trauma for the child victim. The alternative view, presented here and elsewhere (e.g., Conte & Berliner, in press) is that these risks have been over-stated, and that in any event there exist practical and effective procedures which, if adopted, will minimize the likelihood that any child will be harmed by the court experience. Our goal should not be to retreat from involvement with the prosecutorial systems but rather to exert our efforts and influence to make law enforcement and judicial

systems responsive to the needs of these children. To do otherwise is to both deny the legitimate demands of many victimized children for justice, and to tacitly decriminalize acts of molestation, sodomy, and rape when perpetrated upon children.

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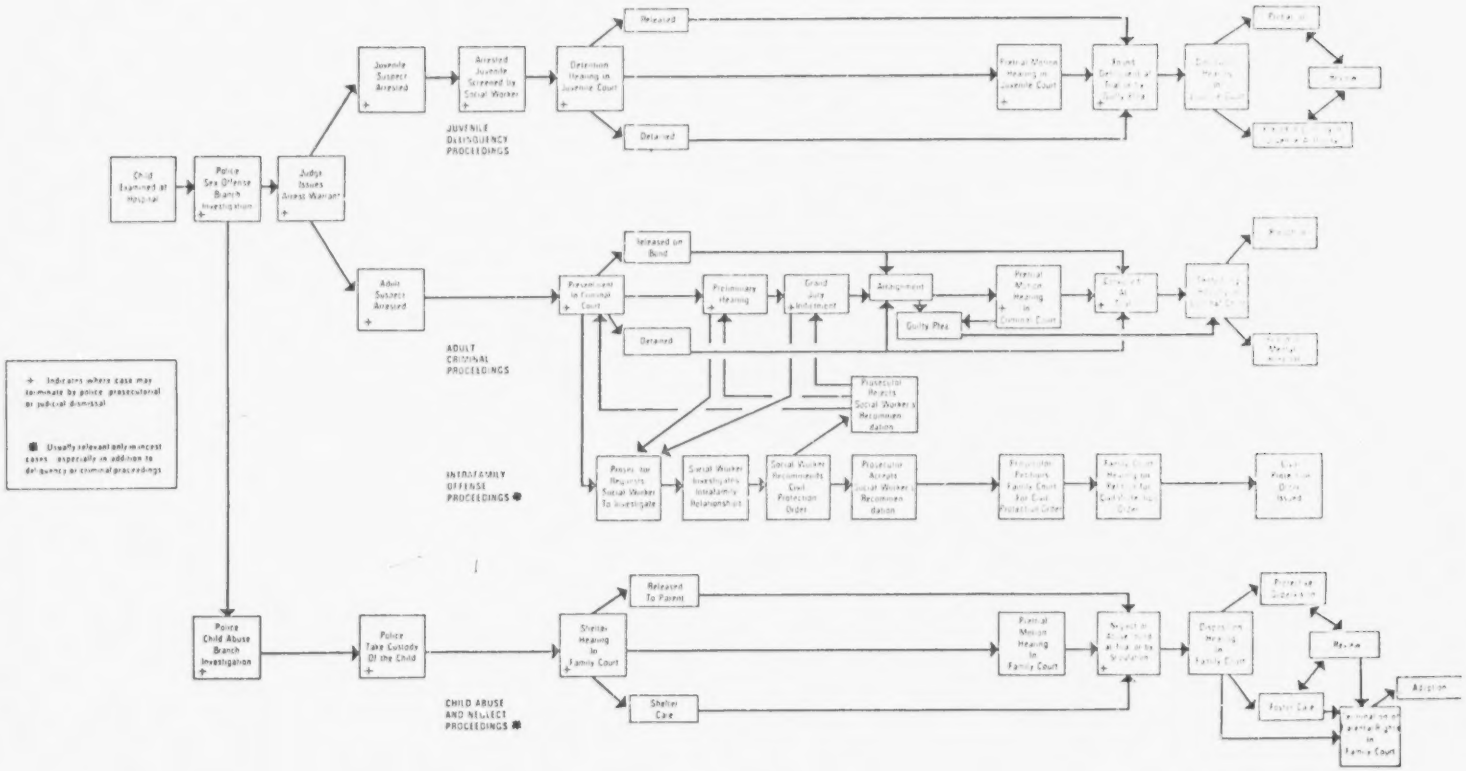
LEGAL PROCESSES IN SEX ABUSE CASES


Child Examined at Hospital
Police Sex Offense Branch Investigation
Judge Issues Arrest Warrant
Juvenile Suspect Arrested
Arrested Juvenile Screened by Social Worker
Detention Hearing in Juvenile Court
Released
Detained
JUVENILE DELINQUENCY PROCEEDINGS
Adult Suspect Arrested
Released on Bond
Detained
Preliminary Hearing
Grand Jury Indictment
Arraignment
Guilty Plea
ADULT CRIMINAL PROCEEDINGS
Prosecutor Accepts Social Worker's Recommendation
Prosecutor Requests Social Worker To Investigate
Social Worker Investigates Intrafamily Relationships
Social Worker Recommends Civil Protection Order
Prosecutor Accepts Social Worker's Recommendation
Prosecutor Pursues Family Court Civil Protection Order
INTRAFAMILY OFFENSE PROCEEDINGS
Police Child Abuse Branch Investigation
Police Take Custody Of the Child
Released To Parent
Shelter Hearing In Family Court
Shelter Care
CHILD ABUSE AND NEGLECT PROCEEDINGS
Foster Care
Action
+ Indicates where case may terminate by police, prosecutorial or judicial dismissal
Usually relevant only in incest cases, especially in addition to delinquency or criminal proceedings

LES AuCOIN
1st District, Oregon

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
WASHINGTON, D.C. 20515

May 17, 1984

Senator Arlen Specter
Chairman, Senate Judiciary
Subcommitte on Juvenile Justice
807 Hart
Washington, D.C. 20510

Dear Senator Specter:

I understand that the Senate Judiciary Subcommittee on Juvenile Justice recently held an oversight hearing on child sexual abuse. I am happy to see that the subcommittee is giving this subject the attention it so badly deserves.

In recent weeks I have been contacted by three different women who are experiencing problems related to child sexual abuse and their children's father's visitation rights. The primary complaint waged by these women is that the judicial system is not equipped to handle this very delicate situation involving a juvenile's testimony and parental visitation rights.

I am enclosing letters and accompanying testimony from two of these women who asked me to forward their concerns to you. It is their hope that this testimony will be useful to the subcommittee as it reviews the problem of child sexual abuse and that it will be included as testimony in the Subcommittee on Juvenile Justice oversight hearing report.

These women are extremely frustrated, not only by the brick walls they have run into during their court battles, but also by the lack of community services and support groups that are available to handle this very special problem.

I thank you for your time and hope that the enclosed testimony is useful to the subcommittee as it reviews the devastating problem of child sexual abuse.

With warm regards,

Sincerely,

LES AuCOIN
Member of Congress

2159 Rayburn House Office Building, Washington, D.C. 20515 (202) 225-0855
1716 Federal Building, 1220 SW Third, Portland, Oregon 97204 (503) 221-2901, Oregon Toll Free Line 1-800-452-1920

LA:bac

Ramona Wallace
161 S.E. 146 Ct.
Van. WA 98664
May 12, 1984

Les A Cain
1716 Federal Bldg.
1220 S.W. 3rd
Portland, OR 97204

I am writing this letter because of my concern for my children and other children in this situation. My husband and I are in the process of getting a divorce. He has every other weekend. During the summer of 1980 my eldest boy, Danny acted completely different than he had before. He was having restless nights, night mares, he was afraid his Dad was watching him or near the house, and he also had a problem with his bowels leaking. Danny was almost 7 at this time. I figured it was nerves because of the divorce. Whenever I ask him what was wrong he ~~could~~ would say, nothing. One evening when Kenney (5½ at the time) Angie (1½ at the time), had gone to bed, I sat down and talked with him, he started crying.

"Daddy said I would never see you again if I told" He told me how his Dad came in to their room, unzipped his sleeping bag and put his finger on his bottom, he was crying and telling his Dad to stop because it hurt so bad.

It had woke his brother Kenny up, and Kenny had witnessed the whole thing. Danny told me that the next morning his Dad made him wash out his bloody undershirts, so I wouldn't find out. He was crying and begging me not to let his Dad take him again. Because of the blood and leaky bowels we believe he put his penis in the anal opening, not just the finger.

The next morning I ask my younger son Kenny about that night. I did not talk to him in front of Danny, but he did confirm my fears. He told me the same story. I called Child Protective Services that day, a lady from there came out with Detective Cruz Hamers. My children told them what had happened

We went to Grand Jury, Danny showed what had happened on a Doll. He was shy and less convincing than his Dad. It was thrown out.

We went back to Civil Court. Judge Gilroy was not interested in the case at all, we lost and visitation was to start. I couldn't send them, my x-husband called me in court again. Judge Gilroy told me if I did not send the children he would give my x husband custody.

I sent them with their Dad after that, afraid I would lose them if I didn't.

The boys would cry and scream, but they had to go. These weekends were ~~was~~ hard.

He attempted to sexually abuse my middle aged child Kenny, but stepped when Kenny started yelling for help, Carl (their father) was afraid the other two children would tell. Here there was, no proof, but my sons word.

I took them to a leading child Physcologist. She was very concerned, I get a new attorney, we came up with a reason to take it back to court, the teachers and school board was behind us. the physcologist gave good testimony, I had a letter from his teacher, but Judge Olivey was not interested. My attorney begged him to talk with the boys, we lost again

I sent the children with him, something happening each time they went. Finally he stopped paying support and I stopped the visits. But now he is paying support again and I know at any time I will be called back in to court and visitation will resume. I will probably lose, I pray I won't lose custody. If so I will take the kids and run.

Please, can't something be done.

Sincerely
Ramona J. Wallon

BETSY
LES AUCOIN
[illegible] BLDG.
1220 SW 3rd
PORTLAND, OR 97204

I would like this to be entered into the hearing record as testimony for the May 15,1984 hearing on sexual child abuse. I understand an oversight hearing is in progress.

Betsy, Here is your copy. Could you please foreward the other copies on to Sen. Edward Kennedy and to Arlen Specter.

I do not have Arlen Specter's address.

Thank-you,
Sally Young

INCIDENTS IN THIS CASE OF
HOMOSEXUAL INCEST

I, their mother, discovered my sons were being homosexually molested by their biological father. They were 3 and 4 years of age. The incest had apparently occurred intermittently prior to this discovery.

Sexual acts included:

digital anal penetration

oral sodomy performed on them by their father

forcing of one son to perform oral sodomy on his father - the force used was a homemade rifle strap wrapped around the child's neck causing a shotening of breath, thenthe father used the rifle to pull the child's head down to the father's penis.

sucking on the boys breast nipples

a gun was held to one chil's head forcing him to perform oral sodomy on his brother

Before my sons were to see the psychiatrist their father had a weekend visitation granted by the court. They later told me that their father, while taking them camping, had forced them to cross a railroad bridge over a river. He would not assist when they cried for help- even

when the fell. They remember the bridge as being terribly high.

To this day when they talk about it they say it terrified them.

After the trial was over my sons revealed a little more of the

story:

> Their father had placed them naked in a large bureau drawer. The drawer contained some toys in it that poked into the back of the younger child. The drawer was left open a crack. The older son could see his father get one of his guns and do something with it.

> While shopping for a Christams tree to cut (probably somewhere in the mountains) one son- the oldest- chose a tree. He held onto one of its branches. His father shot the branch, or the one above it.

WHAT THE COURT DID

Increased visitation privileges slightly for the father

Ordered me to not leave the western part to the state without giving their father a five day written notice and getting his approval. Since I was an avid backpacker, this meant to take my own sons backpacking he - the criminal offender, but not convicted- had the right now to say yes or no to recreational activities I normally shared with my sons. I had committed no crime, with the exception of being totally lived with their fathers behavior.

My lawyer said my story was believed - at least part of it - so the court did not remove custody and give it to the father. This had been considered.

The most frightening aspect of our case of sexual abuse is - had

someone other than myself charged my ex-husband of the crimes I

charged him with, I would have gone to the witness stand in his defense.

Sexual Abuse can be very difficult to pinpoint since:

> There rarely are witnesses

> Unless rape occurs, theremay be no physical symptoms

> Emotional symptoms vary and may be exhibited only around those closest to the child. -To a stranger these may appear to be the way many children behave. As parents we can detect a change in behavior typical to each particular child.

> Many children are afraid to tell for long periods of time because they feel they cooperated and were therefore bad.

> The abuser in cases of incest does not always fit the norm.

> > He may have always had steady employment

> > He may have always maintained the same job

> > He may be very well liked socially

THE JUVENILE VICTIM

We have laws to protect juvenile delinquents, but no laws to protect juven juvenile victims - at least juvenile victims of sexual abuse.

Children have to tell their story several times. Sometimes the questioneers are not sympathetic - even cruel. Social workers sympathetic to the father may drill the child unmercifully ,or, accuse him of lying.

I opt for video tapes of the child's story Questions may be entered from lawyers, judges, social workers, sex offender specialists, etc. to create a standard set of questions that need to be answered in a court of law to have a conviction. These questions need not be asked verbatim, nor in order. They should be answered at some point during the course of the tape.
Since information sometimes comes in segments from the child additional tapes should be allowed as evidence and added to the first tape. Questions should be asked by a friendly, intelligent, sensitive person for whom this is their job. This person should be educated on child sexual abuse and should be aware that each child emotionally handles that abuse in his own way.

WHEN VISITATION SHOULD BE REMOVED

ANY FORM OF SEXUAL ABUSE - if the mother so desires. Frequently the whole story won't be told until after the trial is over. I only was told about all the instances where guns were used the day before the trial. In fact, some instances weren't told to me until after the trial.

THREATS WITHKNIVES OR GUNS OR ANY OTHER WEAPON- even if these be toward the mother or toward the child. We shouldn't have to live our lives in fear for one persons privileges to see (and abuse) his children.

ANY TIME A CHILD REQUESTS NOT TO GO VISIT HIS PARENT BECAUSE OF THINGS THE OTHER PARENT DOES ON VISITATION.

HABITUAL CRIMINAL ACTIVITY

USE OF HEROINE

VIOLENCE TOWARD THE MOTHER

FAIR SENTENCES

In any of the situaltions listed on the page entitled"when visitation should be removed" the mother should be given complete control over visitation. In some cases she alone can determine if it is better for the child to visit occassionally, and when those times are. Remember, the mother did not commit a crime - the father did.

Supervised visitations can be very difficult. Satisfactory people can not always be found. His family frequently believes the offenders story. Nobody wants to agree to give up week-ends for fifteen years to supervise a convicted child molester with his children.

The offender should have to undergo extensive therapy supervised by a specialist on sexual offenders. This should be for as many years as he may need this therapy - minimum of 2 yaers.

The therapist should determine whether he should be committed to a detention center in the evenings after work, be in a center for sexual offenders 24 hours a day, or if just coming in for therapy sessions is safe for society.

Sex offenders ar very good mind players - it can be very difficult as a parent to combat these mind games. I repeat, The victim along with the wishes of the non-offendirg parent should be given control over visitation with the option to remove that visitation when necessary. It is difficult at times to raise children under the best of circumstances. Dealing with emotional difficulties from sexual abuse compounds the job of raising children beyond what should be expected of a single parent. After sexual abuse has been discovered as occuring on visitations gives us the right to go on with our lives. Give us the right to do this without the constant upheaval an offender can create. Let us do this legally. There may not be so many "missing children".

To flee and to hide is a terrible thing to live with. But , it is not as terrible as to live with a child emotionally devasted for the rest of his life possibly because visitation continued after the child reported his father was sexually abusing him.